

CONSTRUCTING A COLONIAL CHIEF JUSTICE:
JOHN LEWES PEDDER IN VAN DIEMEN'S LAND, 1824-1854

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Submitted in fulfilment of the requirements of the
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ABSTRACT

Foundation Chief Justice of Van Diemen's Land, Sir John Lewes Pedder (1793-1859) was appointed by the Colonial Office to administer English law in the colony from 1824. As an official member of the Executive and Legislative Councils, he also provided policy advice and certified local legislation. Until his retirement in 1854, Pedder was a central figure in the colonial administration and settler community.

Contributing to the emerging fields of settler colonial studies and comparative colonial legal history, this thesis situates Pedder within the Anglophone colonial world at a significant period of transition from empire to nation-state. Engaging constructively with Philip Girard's 'window on an age' model for writing the lives of colonial judges, it also broadens the focus from the presentist, professional concerns of conventional judicial biography to a more historically sensitive reading of the archive. Reconstructing Pedder's life-world in the metropolis and the colony reveals how his formative experiences and personal connections shaped his values and professional practices. His repatriation to England in retirement also clearly identifies Pedder as an expatriate professional, rather than a settler-colonist.

From this biographically informed base, the thesis contextualises and tests three enduring popular and scholarly constructions of the chief justice: as a 'hanging judge', a puppet of government, and a champion of the Aboriginal people of Van Diemen's Land. Building on a long literary tradition in which frontier judges were recast as judicial murderers, the tabloid press posthumously constructed Pedder as a Tasmanian Judge Jeffreys. Colonial case law and press commentary are used to demonstrate that mandatory sentencing and community expectations of retributive justice gave Pedder little scope for judicial discretion

during the dying decade of the 'bloody code'.

Inflected by the aspirational rule-of-law rhetoric of settler activists, Pedder's construction as a puppet of government obscures the complex relationships between his judicial, executive and legislative roles. Comparative judicial biography reveals that colonial judges were routinely appointed 'at pleasure' by the imperial executive, and were expected to perform a range of extra-judicial functions. Linking Pedder's experience in Van Diemen's Land to current scholarship in other Anglophone settler polities, this thesis demonstrates that Pedder saw no essential conflict between his duties. Moreover, professional and political conservatism ensured that his primary loyalty was not to settler interests, but to the law and the Crown.

Pedder's benevolent construction as a champion of the island's Indigenous inhabitants centres on his 1831 objection to the policy of banishing all survivors of the Black War to the islands of Bass Strait. His concern that the exiles would 'pine away when they found their situation one of hopeless imprisonment' has been read as a rare challenge to the genocidal impulses of settler colonialism. Yet Pedder's faith in the potential for a negotiated settlement to hostilities was underpinned by the assertion of settler sovereignty and the imperative to displace Indigenous people from prescribed zones of the island. Moreover, having facilitated the capital conviction of four Indigenes in the Supreme Court between 1824 and 1826, Pedder's decisive role in the judicial denial of Aboriginal sovereignty is not compatible with his reputation as an Indigenous champion.

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In Memoriam

H.B. Rattle (1917-2010)

J.D. Fox (1949-2011)

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ABBREVIATIONS

AJCP	Australian Joint Copying Project
AOT	Archives Office of Tasmania – now part of TAHO (see below)
CO	Colonial Office
CON	Convict Department
CSO	Colonial Secretary's Office
DL	Dixson Library, State Library of New South Wales
GRO	General Register Office (UK)
GO	Governor's Office
HO	Home Office
<i>HRA</i>	<i>Historical Records of Australia</i>
ML	Mitchell Library, State Library of New South Wales
NLA	National Library of Australia
<i>OED</i>	<i>Oxford English Dictionary</i>
PRO	Public Record Office – now part of TNA (see below)
RS	Royal Society of Tasmania
SLNSW	State Library of New South Wales
TAHO	Tasmanian Archive and Heritage Office
TNA	The National Archives (UK)



Figure 1: Map of Van Diemen's Land, 1839.¹

Image reproduced courtesy of the Allport Library and Museum of Fine Arts,
Tasmanian Archive and Heritage Office

¹ G. Frankland, Map of Van Diemen's Land (London, J. Cross, 1839),
<<http://catalogue.statelibrary.tas.gov.au/item/?id=544068>> accessed 1 August 2011.

INTRODUCTION

Foundation Chief Justice of the Supreme Court of Van Diemen's Land, Sir John Lewes Pedder (1793-1859) was a central figure in the colonial administration and settler society from 1824 until his retirement in 1854. Appointed by the Colonial Office to administer English law in a multi-jurisdictional superior court which extended full civil and criminal jurisdiction to the penal colony, Pedder also served as a member of the Executive and Legislative Councils. In these *ex officio* roles, he provided legal, policy and legislative advice to the governor.

With his wife Maria Everitt, Pedder arrived in Hobart Town on 15 March 1824 bearing the Royal Charter of Justice which established the Supreme Court.¹ A thirty-year-old equity barrister at the time of his appointment, Pedder belonged to the first of three 'waves' of professional judges posted to the Australian colonies during the nineteenth century.² Like other 'first wavers', Pedder was one of many expatriate professionals who filled official posts throughout the British colonial world.³ Ann Laura Stoler characterises these men as colonisers who 'followed career itineraries and personal trajectories that led them ... across imperial maps'.⁴ Pedder's unusually long tenure in a single colony suggests that his imperial itinerary stalled in Van Diemen's Land in 1837, when promotion to the Supreme Court of New South Wales was thwarted by an applicant with more influential connections in London.⁵

¹ Sorell to Bathurst, 31 March 1824, *HRA* III, IV, p. 126; Archives Office of Tasmania (hereafter AOT) SC479/1/1 Letters Patent issued under the Great Seal, 13 October 1823.

² T. Earls, 'Three waves of Australian judges', Australian and New Zealand Law and History Society Conference, University of Adelaide, 2008; personal communication, 20 January 2009.

³ Z. Laidlaw, *Colonial Connections, 1815-45: Patronage, the Information Revolution and Colonial Government* (Manchester, Manchester University Press, 2005), p. 102.

⁴ A.L. Stoler, 'Tense and tender ties: The politics of comparison in North American history and (post) colonial studies', *Journal of American History* 88 (3) (2001), p. 848; and see D. Lambert and A. Lester (eds.), *Colonial Lives across the British Empire: Imperial Career in the Long Nineteenth Century* (Cambridge, Cambridge University Press, 2006).

⁵ J.M. Bennett, *Lives of the Australian Chief Justices. Sir James Dowling: Second Chief Justice of New South Wales, 1837-1844* (Sydney, The Federation Press, 2001), pp. 105-107.

In the local context, his (unintended) thirty years at the head of the Van Diemen's Land judiciary has endowed Pedder's colonial career with a false fixity. Serving in the administrations of four lieutenant-governors between 1824 and 1854, Pedder 'became a judicial institution',⁶ whose career appears to be neatly book-ended by the judicial and administrative reforms introduced by the *New South Wales Act* of 1823 and Van Diemen's Land's formal transition to self-government in 1856. Second only to the island's vice-regal administrator within the colonial hierarchy, Chief Justice Pedder was a publicly visible player in colonial law and politics for three decades. Surprisingly, then, he has attracted comparatively little sustained scholarly attention.⁷ This historiographical lacuna was filled during the later nineteenth and twentieth centuries with popular and scholarly representations which articulate three recurring constructions of the chief justice: a 'hanging judge', a puppet of government, and a champion of the Aboriginal people of Van Diemen's Land. From a biographically informed base, this thesis contextualises and tests these constructions.

This study is not a conventional judicial biography.⁸ Rather, it engages

⁶ J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. 10.

⁷ There is a significant, and growing, biographical literature on the Lieutenant-Governors of Van Diemen's Land. By contrast, sporadic references to Chief Justice Pedder appear in more general works, including biographies of his most influential contemporary, George Arthur. See, for example, R.M. Baker, 'The early judges in Tasmania', *Tasmanian Historical Research Association Papers and Proceedings* 8 (4) (1960), pp. 71-84; R. Ely (ed.), *Carrel Inglis Clark: The Supreme Court of Tasmania. Its First Century* (Hobart, University of Tasmania Law Press, 1995); K. FitzPatrick, *Sir John Franklin in Tasmania, 1837-1843* (Melbourne, Melbourne University Press, 1949); J.N.D. Harrison (ed.), *Court in the Colony: Hobart Town, May, 1824* (Hobart, Law Society of Tasmania, 1974); P.A. Howell, 'Pedder, Sir John Lewes (1793-1859)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/pedder-sir-john-lewes-2542/text3457>> accessed 27 July 2011; M.C.I. Levy, *Governor George Arthur: A Colonial Benevolent Despot* (Melbourne, Georgian House, 1953); L.L. Robson, *A History of Tasmania, Volume I: Van Diemen's Land from the Earliest Times to 1855* (Melbourne, Oxford University Press, 1983); and A.G.L. Shaw, *Sir George Arthur, Bart., 1784-1854. Superintendent of British Honduras, Lieutenant-Governor of Van Diemen's Land and of Upper Canada, Governor of the Bombay Presidency* (Carlton, Melbourne University Press, 1980).

⁸ As Warren M. Billings usefully points out, judicial biography has followed different trajectories in Anglophone settler societies. During the colonial period, legal and didactic literary models, imported directly from early modern England and the Romans, remained 'wedded to the ancient premise that lessons of history and law arise from the study of

critically with Philip Girard's reflection that the 'fluidity' of colonial judicial careers has more in common with those of their early modern counterparts than of twentieth-century jurists.⁹ Drawing on the social history models of E.P. Thompson and Douglas Hay, and the insights of Michel Foucault, Girard proposes a 'window on an age' model for writing the lives of colonial judges.¹⁰ In contrast to the narrower foci of conventional judicial biography (which is often written by and for lawyers),¹¹ this approach recognises the significance of law to society, but also creates a space in which the political and social contributions of colonial judges can be acknowledged and explored.¹² Thus, Girard explains, 'the "window on an age" approach focuses outward. We take the judge's life as the starting point and look out from there at the surrounding society'.¹³

Pedder's pivotal position in the government and settler-colonial society of Van Diemen's Land makes him an ideal starting point from which to 'look out'. As a trial judge, Pedder interacted directly with a wide selection of the colonial community, from thieves and murderers to litigious

judicial careers'. In the United States, judicial biography has evolved into a highly intellectualised genre, focussing almost exclusively on Supreme Court judges. In Australia, the post-World War II genre reflects a traditional focus on assessing judicial competence. Privileging the concerns of a professional audience, J.A. Thomson points to the characteristic absence of 'broader comparative perspectives' in conventional Australian judicial biographies. W.M. Billings, 'Judges' lives: Judicial biography in America, 1607-1995' in T.L. Coggins (ed.), *The National Conference on Legal Information Issues: Selected Essays* (Littleton, Colorado, Fred B. Rothman and Co., 1996), p. 194; and J.A. Thomson, 'Judicial biography: Some tentative observations on the Australian enterprise', *UNSW Law Journal* 8 (2) (1985), p. 383.

⁹ P. Girard, 'Judging lives: Judicial biography from Hale to Holmes', *Australian Journal of Legal History* 7 (1) (2003), p. 90.

¹⁰ Girard, 'Judging lives', p. 90; and cf. the seminal texts: E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, Penguin Books, 1977); D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson and C. Winslow (eds.), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, A. Lane, 1975); and M. Foucault (trans. A. Sheridan), *Discipline and Punish: The Birth of the Prison* (Harmondsworth, Penguin, 1979).

¹¹ In the United States, significant scholarly debate surrounds the 'nature and purpose of judicial biography', but the genre still speaks primarily to a 'relatively small coterie of lawyers, legal academics and political scientists'. Billings, 'Judges' lives', p. 194; Girard, 'Judging lives', p. 89.

¹² cf. Peter Karsten contrasts the 'exceptionalist' traits of US legal historians and their focus on the Supreme Court with the comparative approach of their Canadian and Australasian counterparts. P. Karsten, 'The CANZ approach to legal history', *Law and History Review* 21 (3) (2003), p. 617.

¹³ Girard, 'Judging lives', pp. 89-90.

settler-capitalists and Indigenous resistance leaders. As an Executive and Legislative Councillor, he helped to shape legislative and policy responses to issues as wide-ranging as freedom of the press and settler-Indigenous legal relations. In his unofficial life, Pedder socialised with emigrants and trans-colonial travellers who linked the island to the wider imperial world, while his pursuit of intellectual and cultural interests led to friendships with international explorers and membership of local communities of interest in which he could indulge his enthusiasm for science, horticulture and the arts. At home, Pedder was surrounded by a close-knit family, including his cousin-wife, Maria, and the orphaned, illegitimate children of his younger brother. As a loyal friend, he enjoyed enduring relationships with many of his colonial colleagues and their families. As an employer of convict and free servants, Pedder took a keen interest in the welfare of his household, and his charitable and philanthropic endeavours extended to the wider community. Tracing the diverse aspects of Pedder's life – on and beyond the bench – this thesis demonstrates that approaching the chief justice as a 'window on his age' offers a nuanced, meaningful, and historically sensitive alternative to the conventional whiggish trajectory in which his historical significance is located in his status as the starting point of a judicial lineage that continues in the post-Federation Supreme Court of Tasmania.

Usefully articulating an approach that is, perhaps, intuitive to historians, Girard's model offers a valuable reminder that judicial biography and legal history have often been generated by lawyers writing about the past, rather than historians writing about the law. Modes of legal history writing (including judicial biography) embrace a wide spectrum, from the narrower concerns of 'history of the law' to newer forms of social and comparative history, in which the law is embedded within broader contexts.¹⁴ From a historian's perspective, this raises intriguing questions about conceptual

¹⁴ Jeremy Finn suggests that 'legal history' differs from the 'history of the law' in that it 'accords a far more prominent place to biography'. J. Finn, 'A formidable subject: Some thoughts on the writing of Australasian legal history', *Australian Journal of Legal History* 7 (1) (2003), p. 57.

frameworks and interpretative strategies. In many ways, then, this thesis seeks to engage in an interdisciplinary ‘conversation’,¹⁵ which brings together the paradigms of history and the law to add a new dimension to understanding how English law and legal culture operated in the colonial space.

Jeremy Finn usefully questions whether the conventional approach of legal historians is not a ‘subconscious result of law school insistence on studying leading cases within the framework of rules of binding precedent’.¹⁶ In this model, he explains, ‘changes in legal procedure brought about by the problems created by social evolution’ become a key focus.¹⁷ In this positivist paradigm, ‘progress’ towards the liberal constitutional order of the modern nation-state appears to have been the ‘inevitable’ resolution of a series of legal anomalies. At the same time, Wilf Prest points out, for lawyers writing legal history the ‘forensic tendency to present a case ... in [a] relentlessly adversarial fashion is difficult to shake off’.¹⁸ Through this lens, judges and their decisions are presented as ‘right’ or ‘wrong’, depending on how closely they conform to current politico-legal sensibilities.

These strands are particularly evident in the only substantial appraisals of Pedder’s official career. Published in 1977 as *Sir John Pedder: First Chief Justice of Tasmania*, J.M. Bennett’s initial ‘pilot study’ was framed by his conviction that Pedder was ‘a figure of profound importance whose contribution to the law in Tasmania has been much under-rated’.¹⁹ Bennett’s original study was subsequently expanded and published under the same title in 2003, as one of a projected series of forty volumes of *Lives of the*

¹⁵ D. Kirkby, ‘Law[yer]’s history, conversationally speaking’, *Australian Journal of Legal History* 7 (1) 2003, pp. 47-52.

¹⁶ Finn, ‘A formidable subject’, p. 70.

¹⁷ Finn, ‘A formidable subject’, p. 53.

¹⁸ W. Prest, ‘The lawyer’s tale: On Geoffrey Robertson QC’s recent excursion into historical biography’, *Meanjin* 66 (3) (2007), p. 63.

¹⁹ J.M. Bennett, *Sir John Pedder: First Chief Justice of Tasmania* (Hobart, University of Tasmania, 1977), p. 1; Bennett, *Sir John Pedder* (2003), p. x.

Australian Chief Justices.²⁰ Conceived in 1969, this series represents an extension of the nineteenth-century short biography tradition of Lord Campbell's *Lives of the Chief Justices of England*.²¹ Bennett aims to address what he perceives as the marginalisation of the law in Australian historiography by writing about its judicial agents. Inflected by presentist, professional concerns, each volume is prefaced with an authoritative foreword by an eminent judge, and speaks primarily to a specialised audience of lawyers and legal academics.²² Combined with favourable reviews in legal history journals,²³ Bennett's authority as a pre-eminent legal historian means that his *Lives* have all the gravity of official history.

Significantly, Bennett belongs to a generation of lawyers turned legal historians who reacted against a pre-World War II paradigm in which Australian legal history was regarded as an 'epiphenomenon of British history'.²⁴ Emphasising his national(ist) focus, Bennett explicitly frames his *Lives* as an 'Australian biographical enterprise'.²⁵ In a recent survey of Australasian legal history writing, Finn points to the importance of 'patriation' issues and growing nationalist sentiment: post-war legal historiography was framed by modern territorial boundaries; its sources were similarly localised, in state or national archives.²⁶ As Girard has similarly discerned in British North America, twentieth-century legal historians have tended to 'assume as normative the shape of the modern nation-state and to project it backwards'.²⁷ The whiggish foundation

²⁰ Thirteen volumes in the series have been published since 2001.

²¹ B. Kercher, 'Book review. *Lives of the Australian Chief Justices*. Sir Francis Forbes: First Chief Justice of New South Wales 1824-1837; Sir James Dowling: Second Chief Justice of New South Wales 1837-1844; and Sir William A'Beckett: First Chief Justice of Victoria 1852-1857', *Australian Journal of Legal History* 7 (2) (2003), p. 287.

²² cf. Girard, 'Judging lives', p. 89, on the North American parallels.

²³ For a selection of extracts from highly favourable reviews, see the publisher's website, <<http://www.federationpress.com.au/bookstore/book.asp?isbn=9781862874824>> accessed 1 January 2012.

²⁴ Kirkby, 'Law[yer]'s history', p. 50; see also Finn, 'A formidable subject', p. 56, on Enid Campbell's early treatment of legal history as an adjunct of social history.

²⁵ Bennett, *Sir John Pedder*, pp. x-xi.

²⁶ Finn, 'A formidable subject', p. 54.

²⁷ P. Girard and J. Phillips, 'Rethinking "the nation" in national legal history: A Canadian

narratives favoured by conventional legal historiography thus proclaim the triumphant rise of democratic, 'postcolonial' nation-states,²⁸ whose (white) citizens enjoy all the benefits of inherited traditions of British constitutionalism and the rule of law.

This thesis shares the concern of a growing number of 'transnational' historians that the conventional 'focus on the nation as a discrete entity ... leads to a very limited sense of history'.²⁹ In contrast to the self-legitimizing aims of nationally framed legal histories, the 'comparativist propensity' of a new generation of legal and '*nonlegal*' historians in common-law settler societies is creating innovative ways of reading the past.³⁰ Highlighting the existence of pan-imperial British settler-colonial cultures in the long nineteenth century, a comparative colonial perspective demonstrates that apparently local specificities can be better explained by examining what is – or is not – happening in comparable contemporary polities.³¹ Instead of proclaiming the 'exceptionalism of [the] nation',³² the 'pursuit of ... local

perspective', *Law and History Review* 29 (2) (2011), p. 608.

²⁸ cf. Lorenzo Veracini's compelling argument that settler-colonial nation-states are 'putatively ... "postcolonial" – except that references to a postcolonial condition appear hollow as soon as indigenous disadvantage is taken into account'. L. Veracini, 'Introducing settler colonial studies', *Settler Colonial Studies* 1 (1) (2011), pp. 1-12.

²⁹ A. Curthoys, 'Cultural history and the nation' in H-M. Teo and R. White (eds.), *Cultural History in Australia* (Sydney, UNSW Press, 2003), p. 22. See also A. Curthoys, 'We've just started making national histories and you want us to stop already?' in A. Burton (ed.), *After the Imperial Turn: Thinking with and through the Nation* (Durham, Duke University Press, 2003), pp. 70-89; and A. Burton, 'Who needs the nation? Interrogating "British" history', *Journal of Historical Sociology* 10 (3) (1997), pp. 227-248.

³⁰ Karsten, 'The CANZ approach to legal history', p. 617. Original emphasis. The comparative approach is exemplified in a growing body of international scholarship. See, for example, L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, Cambridge University Press, 2002); H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008); P.D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass., Belknap Press of Harvard University Press, 2010); P. Karsten, *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora – the United States, Canada, Australia, and New Zealand, 1600-1990* (Cambridge, Cambridge University Press, 2002); and D. Kirkby and C. Coleborne (eds.), *Law, History, Colonialism: The Reach of Empire* (Manchester, Manchester University Press, 2001).

³¹ Girard and Phillips, 'Rethinking "the nation" in national legal history', p. 626.

³² Girard and Phillips, 'Rethinking "the nation" in national legal history', p. 608. On the comparable insularity of post-war Canadian historiography, see also P. Girard, 'Liberty, order, and pluralism: The Canadian experience' in J.P. Greene (ed.), *Exclusionary Empire: English Liberty Overseas, 1600 to 1900* (New York, Cambridge University Press, 2009), p. 163.

minute details' helps to illuminate broader, global processes.³³

Methodology and sources

Combining Girard's 'window on an age' with the comparative perspectives increasingly espoused by transnational historiography, this study establishes a historically grounded basis from which to explore Pedder's 'age' in Britain and the colonies. As an interdisciplinary 'conversation' between history and the law, it also draws on tools and interpretative strategies that reflect my own multi-disciplinary background in early modern English history and European language and literature studies.

In many ways, language is at the core of this thesis. Endeavouring to interpret Pedder's world from his own, unmediated perspective, I have allowed his voice to speak as much as possible. Where conventional treatments often quote from archival sources to advance the narrative, this thesis uses close reading – a technique adapted from literary criticism – to identify and interpret patterns and associations in a text.³⁴ The value of this approach to colonial sources is demonstrated in its capacity to make sense of the cultural and historical connotations of words and concepts whose meanings shift over time, or outside specific contexts, to the extent that they become *faux amis*. Take, for example, Pedder's confidential 1838 critique of the 'deplorably weak' colonial government.³⁵ 'The Secretary of State', he wrote to the former governor, George Arthur, 'might as well give up the Government of the Colony, and vest it at once in a *junta* composed of [Arthur's opponents] ... if it be not occurring, with or without his Lordship's consent'.³⁶ Two recent studies gloss Pedder's remarks as 'satirical comments'

³³ Curthoys, 'Cultural history and the nation', p. 36.

³⁴ For a basic outline of the technique, see P. Kain, 'How to do a close reading', The Writing Center, Harvard University, <<http://www.fas.harvard.edu/~wricntr/documents/CloseReading.html>> accessed 1 January 2012.

³⁵ Pedder to Arthur, 28 March 1838, Papers of Sir George Arthur, vol. 10, ML ZA 2170, reel MAV/ FM4/ 3671.

³⁶ Pedder to Arthur, 28 March 1838. Editorial emphasis.

or a 'reflection of his own very undemocratic and reactionary views'.³⁷ For the modern reader, the term 'junta' perhaps most readily evokes a military *coup d'état*. However, if we recognise the connotations of 'junta' in English political history (a cabal) and the Peninsular Wars of Pedder's youth (a committee), the focus shifts. Implicitly contrasting the 'weak' government of Sir John Franklin with the strong government of his gubernatorial predecessor, Pedder's reference to a 'junta' highlights a power vacuum in which a self-appointed faction appeared to be setting itself up in place of the legitimate source of colonial authority.³⁸

For a non-legal historian, this language-centred approach is particularly useful for clarifying legal concepts. Using contemporary legal treatises, such as Blackstone's ubiquitous *Commentaries on the Laws of England*,³⁹ and jury instructions on points of law reproduced on the colonial case law websites edited by Bruce Kercher and Stefan Petrow,⁴⁰ this thesis illustrates the importance of understanding historical offences like criminal libel and doctrines like constructive presence. It can be easy to forget that lawyers and historians ask different questions and require different standards of proof to sustain their arguments. As comparative colonial legal histories and the emerging field of forensic linguistics demonstrate, it is vital for historians analysing criminal trials in a 'narrative mode' to understand the limits of

³⁷ C.R. Joel, *A Tale of Ambition and Unrealised Hope: John Montagu and Sir John Franklin* (Melbourne, Australian Scholarly Publishing, 2011), p. 246; Bennett, *Sir John Pedder*, p. 86.

³⁸ Editorial emphasis. In English political history, the term has been 'chiefly applied to the Cabinet Council of Charles I, to the Independent and Presbyterian factions of the same period, to the Rump Parliament under Cromwell, and to the combination of prominent Whigs in the reigns of William III and Anne'. During the Peninsular Wars, 'junta' was the name of the local councils established in different districts of Spain to conduct the war against Napoleon in the summer of 1808'. *OED*.

³⁹ W. Blackstone, *Commentaries on the Laws of England* (Oxford, The Clarendon Press, 1765-1769); and cf. W. Prest, 'William Blackstone and the historians', *History Today* 56 (7) (2006), pp. 44-49, who points to some of the pitfalls for historians using historical legal sources.

⁴⁰ B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Division of Law Macquarie University), <<http://www.law.mq.edu.au/scnsw/>> and B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <<http://www.law.mq.edu.au/sctas/>> accessed 1 January 2012.

forensic evidence.⁴¹ Being aware of the rules of evidence and the statutory or common-law basis of historical offences and their punishments provides necessary context for a more nuanced reading of archival records. At the same time, it is important to recognise that Van Diemen's Land law reports were not produced as official records of the court, but for popular audiences in the colonial press. As an erstwhile court reporter, I am particularly conscious of the ways in which editorial intervention and the use of stenography (rather than audio recording equipment) have influenced the form and content of the published reports. Mindful of these issues, and taking Pedder as its focus, this thesis is concerned to explain colonial law and legal processes in a way that avoids the unreflectively 'ameliorist' assumptions of whiggish narratives, especially in cases which have strong emotive resonances, such as capital punishment.⁴² Here, integrating the disciplinary paradigms of history and the law leads to new insights.

Following Philip Hamburger's valuable revival of common-law ideals of 'judicial duty', an attentive reading of Pedder's statements illuminates his sense of his obligation to judge matters 'in accord with the law of the land'.⁴³ This insight adds a new layer of meaning to the chief justice's inherently legalistic reading of Indigenous resistance to colonisation. By focussing on Pedder's understanding of the formal relationship between the Aboriginal people of Van Diemen's Land and the Crown, this thesis makes an original contribution to scholarship on settler-Indigenous legal relations. It emphasises Pedder's judicial conviction that Van Diemen's Land was a colony by settlement, in which settler law prevailed and Indigenous people were nominally British subjects.⁴⁴ It also elucidates Pedder's adherence to the

⁴¹ C. Heffer, 'The language and communication of jury instruction' in J. Gibbons and M.T. Turell (eds.), *Dimensions of Forensic Linguistics* (Amsterdam and Philadelphia, John Benjamins Publishing Company, 2008), pp. 47-65, esp. pp. 47-49.

⁴² R. McGowen, 'Revisiting *The Hanging Tree*: Gatrell on emotion and history', *British Journal of Criminology* 40 (1) (2000), p. 8.

⁴³ P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass./London, Harvard University Press, 2008), p. 17.

⁴⁴ A.C. Castles, *An Introduction to Australian Legal History* (Sydney, Law Book Company, 1982), pp. 3, 6-10.

Blackstonian reception formula, which regulated the application of English law according to the 'condition' of the colony.⁴⁵

Addressing an aspect of Pedder's career that has received insufficient scholarly examination, this thesis devotes particular attention to the chief justice's judicial interaction with Indigenous people, and his extra-curial role in formulating colonial policy towards settler-Indigenous conflict. Demonstrating the limitations of the 'nation' as a historical frame, this study also refutes existing readings of Pedder's first criminal case, which involved the manslaughter of a 'black man'. Turning again to the importance of understanding the historical and cultural connotations of particular words, it reveals that twentieth-century perceptions of colonisation as a 'white' enterprise have led to a misreading of the language of racial identification, so that 'black' is erroneously synonymised with Aboriginal.

In a further differentiation from existing accounts, this thesis highlights how the particularities of Pedder's professional experiences resonate with broader pan-imperial processes. As John McLaren's comparative histories of Pedder's contemporaries in the colonial judiciary demonstrate, the simultaneous appointment of chief justices to the executive and legislative branches of government was common practice in early nineteenth-century empire.⁴⁶ Similarly, by offering a quantitative perspective on relevant

⁴⁵ The Blackstonian reception doctrine articulates that 'if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject, are immediately in force'. There were 'very many and very great restrictions', however, and colonists could 'carry with them only so much of the English law as is applicable to their new situation and the condition of an infant colony'. This 'significant qualifying rider' appeared in a 'Supplement to the first Edition, containing the most material Corrections and Additions in the Second'. Blackstone, *Commentaries*, pp. 104-105; W. Prest, 'Antipodean Blackstone: The *Commentaries* "Down Under"', *Flinders Journal of Law Reform* 6 (2) (2003), p. 158.

⁴⁶ J. McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900* (Toronto, University of Toronto Press, 2011); 'Men of principle or judicial ratbags? The trials and tribulations of maverick colonial judges in the nineteenth century or a funny way to run an empire', *Windsor Review of Law and Social Issues* 27 (2009), pp. 145-166; 'The judicial office ... bowing to no power but the supremacy of the law: Judges and the rule of law in colonial Australia and Canada, 1788-1840', *Australian Journal of Legal History* 7 (2) (2003), pp. 177-192; and 'The rule of law in British colonial societies in the 19th century: Gaseous

variables, such as age, education, and professional experience, David Duman's and Tony Earls' prosopographical studies provide vital context for reading Pedder's appointment to the colonial bench.⁴⁷ Echoing their findings, as well as those of P.A. Howell, Zoë Laidlaw, and R.S. Neale, this thesis uses thick description and micro-historical analysis of contemporary Colonial Office applications to explore the central role of networks and patronage in Pedder's appointment to Van Diemen's Land.⁴⁸ This historically sensitive approach underscores, and further argues against, the simplistic Sancho Panza/Samuel Smiles binary of 'failed gentry' versus 'successful careerist' which still inflects accounts of his appointment.⁴⁹

A growing body of colonial scholarship emphasises that histories of the British settler-colonial world are not just about nation-building projects, but transnational movements and discourses that 'run across and athwart state-archived paper trails'.⁵⁰ As Ann Curthoys reminds us, it is important to recognise and respect the fact that colonial officials, like Pedder, were not proto-Australians, but expatriate Englishman for whom 'home' and the

rhetoric or guiding principle?', *The transposition of empire: Historiographic approaches to the translation of juridical and political thought in colonial contexts*, Monash Centre, Prato, 2009, <<http://www.ched.uq.edu.au/Transitions/McLaren.PratoPaper.pdf>> accessed 1 August 2011. See also R.L. Fraser, "'All the privileges which Englishmen possess': Order, rights, and constitutionalism in Upper Canada" in R.L. Fraser (ed.), *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography* (Toronto, University of Toronto Press, 1992), pp. xxi-xcii.

⁴⁷ D. Duman, *The English and Colonial Bars in the Nineteenth Century* (London, Croom Helm, 1983); Earls, 'Three waves of Australian judges'; and personal communication, 20 January 2009.

⁴⁸ P.A. Howell, 'Shovelling out distressed gentlefolk? A reconsideration of the Colonial Office's use of its powers of patronage in Van Diemen's Land' in G. Winter (ed.), *Tasmanian Insights: Essays in Honour of Geoffrey Thomas Stilwell* (Hobart, State Library of Tasmania, 1992), pp. 64-80; Laidlaw, *Colonial Connections*; and R.S. Neale, *Class and Ideology in the Nineteenth Century* (London, Routledge & Kegan Paul, 1972), esp. chapter 5, 'The colonies and social mobility: Governors and executive councillors in Australia, 1788-1856', pp. 97-120.

⁴⁹ Neale, *Class and Ideology in the Nineteenth Century*, p. 101; cf. Bennett, *Sir John Pedder*, p. 9, who discounts the importance of patronage and non-professional factors, and unreflectively dismisses the Colonial Office selection procedure as 'eccentric'.

⁵⁰ Stoler, 'Tense and tender ties', p. 862. Cultural geographers, like Alan Lester, usefully highlight the shared networks and discourses which contributed to a global British settler identity and to settler-colonial understandings of race. See, for example, A. Lester, *Imperial Networks: Creating Identities in Nineteenth-Century South Africa and Britain* (London, Routledge, 2001); and 'George Augustus Robinson and imperial networks' in A. Johnston and M. Rolls (eds.), *Reading Robinson: Companion Essays to Friendly Mission* (Hobart, Quintus Publishing, 2008), pp. 27-43.

‘nation’ were always Britain.⁵¹ Similarly, it is important to acknowledge that, while Pedder’s Tory sensibilities and belief in monarchical government might not have survived the Age of Reform as mainstream values, they are no less valid. Indeed, there is an even greater obligation on historians to elucidate Pedder’s worldview, precisely because it is not so ‘congenial’ to modern liberal democratic sensibilities.⁵²

Stoler insists that research which ‘begins with people’s movements rather than with fixed polities opens up more organic histories that are not compelled by originary narratives designed to show the “natural” teleology of future nations’.⁵³ Guided by the assumption that recovering the shared lives of Pedder and his intimates provides a valuable framework through which to engage with his life-world, this thesis is particularly concerned to explore how the movement of people and ideas shaped Pedder’s unofficial life. The questions and paradigms of family history reveal new insights into Pedder’s background and character. Using genealogical investigation, this thesis maps Pedder’s kinship connections accurately for the first time. It identifies his companionate marriage to maternal cousin, Maria Everitt, as a central and sustaining relationship, and rediscovers his role as uncle/foster-father to their orphaned niece and nephew. The identification of Pedder’s father as a socially and professionally subordinate London attorney contextualises the family’s investment in Pedder’s education as a barrister within early nineteenth-century aspirations of social mobility for eldest sons. Pedder’s own interest in colonial appointment is also explored in terms of recognisable responses to the contemporary oversupply of graduates and

⁵¹ Curthoys, ‘We’ve just started making national histories and you want us to stop already?’, pp. 70-89; and Burton, ‘Who needs the nation’, pp. 227-248.

⁵² Girard, ‘Judging lives’, p. 103; and cf. Bridget Brereton’s biography of a more liberal colonial judge, which ‘effortlessly sketches in the economic, political and administrative background against which the lives of her central characters unfold’. B. Brereton, *Law, Justice and Empire: The Colonial Career of John Gorrie, 1829-1892* (Kingston, Press University of the West Indies, 1997).

⁵³ Stoler, ‘Tense and tender ties’, p. 862; Lambert and Lester, *Colonial Lives Across the British Empire*, p. 3.

post-war economic dislocation in Britain.⁵⁴

In contrast to the conventional focus on the public man, for which a mass of official documentation survives, the paucity of personal papers challenges the biographer to interrogate and imagine extant sources in different ways. Broadening the search for primary sources to the papers of family and friends of his wife, for example, provides new perspectives on Pedder's life beyond the bench.⁵⁵ A series of satirical essays on life in Hobart Town in the late 1820s provides an unlikely, but valuable, source. In the absence of a definitive likeness of the judge,⁵⁶ convict novelist Henry Savery offers a vivid description of a 'tall thin Gentleman, of solemn melancholy visage, apparently a valetudinarian, who took snuff largely, and seemed as little pleased with himself as with all around him'.⁵⁷ A material culture studies approach also offers a fruitful point of access to Pedder's life-world.⁵⁸ Archival references to the sites and paraphernalia of his domestic life and leisure activities highlight relationships, interests, and etiquettes, which allow this thesis to contest the myth, propounded by Bennett, that Chief Justice Pedder was a solitary ascetic, who lived only through his work.⁵⁹

⁵⁴ L. O'Boyle, 'The problem of an excess of educated men in Western Europe, 1800-1850', *Journal of Modern History* 42 (4) (1970), pp. 471-495, esp. pp. 479, 486.

⁵⁵ Correspondence between Maria Pedder and her women friends sheds new light on the companionate marriage. See, for example, RS8/F7 William and John Clark of Cluny, Bothwell, Family Papers, 1812-1872: William Pritchard Weston to sister-in-law, Jane Clark, 1833-1836, 1855-1861; and RS8/F44 Maria (Everett) Pedder, wife of Sir John Pedder, 1837-1854, Royal Society of Tasmania Library Collection.

⁵⁶ Bennett reports that an oil portrait was 'in the ownership of a collateral descendant until acquired by the Archives'. A photographic reproduction of a painting purporting to show Pedder as a young man is held in the Tasmanian Archive and Heritage Office; however, its authenticity is doubtful, and recent consultation with archivists has failed to find any trace of the original painting. Bennett, *Sir John Pedder*, p. xii.

⁵⁷ C. Hadgraft and M. Roe (eds.), Henry Savery, *The Hermit in Van Diemen's Land* (St Lucia, University of Queensland Press, 1964), p. 57.

⁵⁸ Material cultural studies is a particularly well-developed discipline in the United States. See, for example, B.L. Herman, *The Stolen House* (Charlottesville and London, University of Virginia Press, 1992); K. Harvey (ed.), *History and Material Culture: A Student's Guide to Approaching Alternative Sources* (Abingdon, Routledge, 2009).

⁵⁹ Bennett, *Sir John Pedder*, pp. 112-113.

Structural summary

Three thematic Parts provide the framework for contextualising and testing three recurring constructions of Chief Justice Pedder in the existing literature. A short introduction to each Part outlines the key themes, chronologies, and conceptual frameworks of its component chapters. Within each Part, each chapter also has an Introduction, which identifies and problematises the construction to be tested, and situates the responses of this thesis within relevant secondary scholarship. Chapter Conclusions draw together themes and findings, while a final thesis Conclusion summarises its findings and implications, identifies specific contributions to scholarship, and points to avenues for future research.

Part I reconstructs key aspects of Pedder's life-world – the experiences, activities, and connections that constitute the world of the individual. Concerned with the key themes of identity, connection, and milieu, this first Part provides a biographically informed base, which demonstrates that Pedder's official life can be better understood through a more historically grounded elucidation of the world in which he operated. Chapter 1 explores Pedder's metropolitan origins, education, and professional background. It also traces the networks and connections which facilitated his appointment to the colonial judiciary, and emphasises the importance of patronage and non-professional criteria to the selection process.

Chapter 2 turns the focus to Pedder's marriage and family life. It identifies his wife, Maria, as a maternal cousin with whom he enjoyed a long and supportive marriage. This chapter highlights Pedder's affection for family, and reveals that his younger brother, William, spent several years in Van Diemen's Land with his regiment during the early 1830s. William's previously unrecorded relationship with free settler, Fanny Preddy, produced two natural children, who later joined John and Maria Pedder's household after the death of their mother. This newly recovered conception of Pedder as husband, brother and uncle/foster-father demonstrably

contests the myth of a lonely existence.

Chapters 3 and 4 explore Pedder's unofficial interactions with colonial society, through his friendships and the communities of interest in which he participated. Pedder's reputation for integrity, and his unusually secure elite status within an otherwise fluid society, made him a benchmark for respectability. These chapters emphasise that Pedder's self-conception as an English gentleman is central to understanding his concern to manage his reputation. They also illuminate the many ways in which he modelled gentlemanly conduct, through the material culture of his life-world and through charitable, philanthropic, and cultural activities.

Pedder's intersecting judicial, legislative and executive functions are troubling to conventional narratives of settler colonialism in Van Diemen's Land/Tasmania, and are generally condemned as antithetical to liberal rule-of-law ideologies. Engaging constructively with a growing body of comparative colonial and legal history, Part II contextualises and tests two key constructions of Pedder that emerge from the dissonance between Pedder's roles, the aspirations of settler activists, and the triumphalist histories of reform promoted by their actual and ideological descendants.

Chapter 5 challenges Pedder's posthumous construction as a Tasmanian Judge Jeffreys. It argues that the literary trope of the 'hanging judge' has a long tradition in the Anglophone world, and has been evoked in a range of frontier contexts. This chapter contrasts two tabloid 'histories' of the 'hanging judge' with the legal, political and social contexts behind the operation of the 'bloody code' in Van Diemen's Land. Challenging modern readers in the abolitionist common-law world to humanise a 'hanging judge', Chapter 5 also highlights Pedder's affecting public displays of emotion when sentencing prisoners to the gallows.

Chapter 6 tests Pedder's construction as a puppet of government. Inflected

by liberal rule-of-law ideologies, conventional condemnation of Pedder's combined roles as head of the judiciary and member of the executive government overlooks the common contemporary practice of appointing colonial judges 'at pleasure' to fulfil multiple functions. Following Hamburger, this chapter highlights the central role of 'judicial duty' in an era before the Diceyan rubric of separation of powers dominated understandings of judicial independence. Moreover, as McLaren's comparative studies demonstrate, colonial judges who did not meet imperial expectations of 'Baconian' service to the Crown risked removal from office. In this context, Chapter 6 argues, Pedder's thirty years on the bench indicates that the chief justice was able to retain Colonial Office support by successfully negotiating his competing duties.

Part III explores Pedder's benevolent construction as a champion of the Aboriginal people of Van Diemen's Land. Chapter 7 interrogates claims that Pedder's first criminal trial in the Supreme Court represents a 'seminal example' of the disinterested administration of the law in cases emerging from settler-Indigenous conflict.⁶⁰ Challenging conventional assumptions that William Tibbs' conviction for the manslaughter of a 'black man' reveals Pedder's positive attitude towards Indigenous people,⁶¹ this chapter highlights the presence of African-diaspora convicts and other people of colour in Van Diemen's Land, and positively identifies Tibbs' victim as an American-born convict.

As Lisa Ford's paradigm-shifting *Settler Sovereignty* demonstrates, the 'exercise of jurisdiction over indigenous crime performs the myth of settler sovereignty'.⁶² Even as the Supreme Court of New South Wales evinced

⁶⁰ G. Green. 'The marginalisation of law in Australia', Order of Australia Oration, 18 February 2006, p. 9, <<http://www.theorderofaustralia.asn.au/downloads/OAA2006ORATIONSirGuyGreen.pdf>> accessed 5 November 2009.

⁶¹ A slightly refocussed version of this chapter is published as J. Fox, 'R. v. Tibbs (1824): A case of mistaken identity', *History Australia* 8 (2) (2011), pp. 21-41.

⁶² L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia*,

‘persistent uncertainty’ in asserting its ‘invented’ jurisdiction over Indigenous offenders during the 1820s,⁶³ Chief Justice Pedder facilitated the criminal trial of four Indigenous men for their involvement in frontier killings as though his jurisdiction to try the cases was unproblematic. Chapter 8 interrogates Pedder’s decisive role in the criminalisation of Indigenous resistance to colonisation through a close reading of *R. v. Mosquito and Black Jack* [1824] and *R. v. Jack and Dick* [1826]. Significantly predating the first murder prosecution of an Indigenous person in Sydney, this chapter argues that the Van Diemen’s Land cases provide evidence of Pedder’s judicial complicity in the denial of Aboriginal sovereignty, which materially challenges his construction as a champion of the Aboriginal people.

Chapter 9 shifts the focus from the courthouse to the council chamber to examine Pedder’s extra-curial influence on two key policy responses to frontier conflict: the expulsion proclamation of 15 April 1828; and the strategy of Indigenous expatriation approved by the Executive Council on 23 February 1831. A close reading of Pedder’s response to a draft of the expulsion proclamation underscores his inherently legalistic reading of Indigenous aggression as felony or civil disturbance, as well as his concern to distinguish between ‘hostile’ and ‘harmless’ Indigenous. As the only Executive Councillor to question the policy of indiscriminate exile for all Indigenous survivors of the Black War to the islands of Bass Strait, Pedder has gained a reputation for championing Aboriginal people. In words that are regularly attributed to Pedder himself, the judge’s humanitarian concern that exiles would ‘soon begin to pine away when they found their situation one of hopeless imprisonment’ was glossed by colonial historian James Bonwick in 1870 as a protest against ‘an unchristian attempt to destroy the whole race’.⁶⁴ A close reading of the Executive Council minutes of meeting reveals

1788-1836 (Cambridge, Mass., Harvard University Press, 2010), p. 208.

⁶³ Ford, *Settler Sovereignty*, pp. 181-182.

⁶⁴ Extract of the Minutes of the Executive Council, 23 February 1831, in A.G.L. Shaw (ed.), *Van Diemen’s Land: Copies of all Correspondence between Lieutenant-Governor George Arthur and His Majesty’s Secretary of State for the Colonies on the Subject of the Military Operations lately*

that Pedder's actual remarks encompass a more complex set of legal, policy and humanitarian concerns.

A note on terminology

Van Diemen's Land was established as a British penal colony in 1803, and remained administratively subordinate to New South Wales until December 1825. The island was formally renamed Tasmania with the granting of self-government in 1856, only weeks before Pedder's repatriation to England. As James Boyce argues, Van Diemen's Land 'needs to be understood as a convict *society*'; renaming the island Tasmania after the end of transportation reflected the anxiety of the local ruling class to remove the 'stigma' of convictism associated with the old name.⁶⁵ While the two polities occupied the same geographical space, they represent distinct phases of Anglophone settler colonialism on the island. This thesis prefers place names which reflect the usage and jurisdictional entities of Pedder's lifetime.

Race is a central theme of Part III. At the risk of offending current sensibilities, some examples of derogatory language referring to people of African-diaspora heritage are quoted from archival sources as part of a broader discussion of the historiography of race in Van Diemen's Land. 'Person of colour' is preferred, both to reflect colonial usage and as an inclusive term which has regained currency. The term 'non-indigenous black' is also used to emphasise the fact that 'black' was deployed by settler-colonists to refer to immigrant people of colour *and* Indigenous people.

Settler responses to Aboriginal people are another important element of

carried out against the Aboriginal Inhabitants of Van Diemen's Land. Facsimile edition (Hobart, Tasmanian Historical Research Association, 1971; originally published London, House of Commons, 1831), p. 82; J. Bonwick, *The Last of the Tasmanians; or, The Black War of Van Diemen's Land* (London, Sampson, Low, Son & Marston, 1870), p. 240.

⁶⁵ J. Boyce, *Van Diemen's Land* (Melbourne, Black Inc., 2008), pp. 1-2, 9. Original emphasis. The present-day federal state of Tasmania signifies yet another articulation of internal and external power relations.

Part III. This thesis is not an Indigenous-centred history, and, while it aims to respect cultural sensitivities, it recognises that many colonists made sense of Van Diemen's Land through the prism of previous knowledge or experience of the Atlantic, Pacific and Indian Ocean worlds. Through this lens, Aboriginal 'natives' were seen as members of 'tribes' led by 'chiefs'. Labels referring to 'tribal' or 'clan' groupings are quoted from colonial sources to reflect contemporary understandings of Indigenous social organisation and affiliation. Some Aboriginal people were known to settlers (and historians) by a number of tribal and other names. English nicknames were often applied to individual Indigenous people who interacted regularly with colonists. Variant spellings were common, and these names were usually italicised in the colonial press. This practice has been replicated in quotations.

PART I

PEDDER'S LIFE-WORLD

As Chief Justice of Van Diemen's Land and *ex officio* Executive and Legislative Councillor, Pedder's official career has conventionally defined his colonial existence. Within whiggish foundation narratives, his claim to historical significance is located in his status as the 'first' chief justice – the starting point of a judicial lineage which continues in the post-Federation Supreme Court of Tasmania. This thesis contends that this conflation of office and individual represents a limited construction of John Lewes Pedder. Moreover, it argues, the local and presentist focus of existing accounts of Pedder's judicial career obscures the broader British imperial world in which he was but one of many expatriate professionals.

Part I is framed by the key themes of identity, connection, and milieu. Informed by the questions and techniques of family and social history, and firmly positioned within current comparative colonial historiography, its chapters employ thick description and microhistorical analysis to evoke Pedder's life-world – the experiences, activities, and connections that constitute the world of the individual. This endeavour is guided by the belief that recovering the 'shared lives' of Pedder and his intimates provides a valuable framework around which to fashion multilayered narratives. It also supplies essential context for a more historically sensitive reading of the archival traces of his life.

Chapter 1 examines Pedder's metropolitan origins, professional background, and the networks which facilitated his appointment to the Supreme Court of Van Diemen's Land. Mapping kinship connections identifies a close-knit family and places the young Pedder among London's socially and geographically mobile bourgeoisie: ideologically aligned to the Tory elite, but not quite the quintessentially English establishment figure connoted by his

colonial judicial office. Where existing accounts assess his legal abilities, a close reading of contemporary applications to the Colonial Office sheds new light on the role of personal, professional and political connections in Pedder's appointment to the colonial judiciary in 1823.

Chapters 2 to 4 intensify the focus on Pedder's unofficial life. By identifying friends and family members, they reconstruct previously overlooked personal relationships. Chapter 2 repopulates the domestic sphere as contemporaries would have known it. Providing clues to gender roles and family dynamics, this chapter highlights the centrality of Pedder's companionate marriage to his cousin-wife, Maria Everitt, and examines the social context of his newly identified role as uncle/foster-father to his brother's orphaned, illegitimate children.

In the absence of any sustained enquiry into his private world, the chief justice has been portrayed as a solitary ascetic, who lived only through his work. Chapters 3 and 4 contest this myth. They trace Pedder's wide-ranging intellectual, philanthropic and recreational interests, and the friendships and associations generated (or shunned) in his multiple unofficial interactions. This approach also emphasises that Pedder's self-conception as an English gentleman is crucial to understanding his reputation for integrity and respectability. Concluding the project of Part I, Chapters 3 and 4 uncover new and compelling evidence to support their justifying assumption that Pedder's judicial career and official persona cannot be properly understood without a nuanced and historically grounded reading of his broader life-world.

CHAPTER 1

FROM THE CITY OF LONDON TO HOBART TOWN

Pedder's family and professional background locate him firmly in the metropolis in the opening decades of the nineteenth century. Benefitting from the socio-economic swing towards urban interests, his personal transition from the commercial milieu of the City to the political orbit of the Tory elite was facilitated through education and the law. The confrère of a leading public school, the Inns of Court, Cambridge and the Chancery bar, Pedder internalised elite values and became assimilated into the social and professional matrix of the conservative establishment. Through mapping these metropolitan influences and connections, Chapter 1 opens new perspectives on his appointment as Chief Justice of Van Diemen's Land.

Section 1.1 traces Pedder's formative years to reveal his family, educational and professional background. As the eldest son of a commercial family, the young Pedder became the focus for investment in social mobility. In contrast to his father's subordinate socio-professional rank as an attorney, Pedder's formal education and standing as a barrister secured his gentlemanly status. In a highly competitive profession, financial security was more elusive, however.

In the context of post-war economic dislocation in Britain and growing interest in the Australian colonies in the early 1820s, section 1.2 explores Pedder's application for judicial appointment in Van Diemen's Land. Correspondence with the Colonial Office sheds no light on his personal reasons for pursuing colonial appointment in 1823. Instead, this section unpacks the submissions of contemporary appointees to new law offices in the southern colonies to illuminate the mechanics of Colonial Office recruitment and discover the motivations of his peers.

Section 1.3 concludes this thick description of Pedder's appointment to the colonial judiciary. Plotting his connections to political and professional networks, it identifies how intermediaries with links to senior government officials increased Colonial Office interest in his application. Resonating with the comparative research of David Duman and Tony Earls, this section also illustrates some of the ways in which Pedder's particular experience exemplifies their broader findings that professional competence was not the most important factor in nineteenth-century judicial appointments.

1.1 A metropolitan professional: background and early career

Born in London on 10 February 1793, John Lewes Pedder was the eldest son of John Pedder and his wife, Jane Brucker.¹ The family was completed with the addition of a younger brother, William, born in 1796, and a sister Jane, born c. 1798.² The family was strongly connected to the City of London over several generations, and reflected the international and commercial outlook of the metropolis. Pedder's paternal grandfather, also John Pedder, was a City merchant and agent for a trading company centred on Africa.³ His maternal grandfather, George Brucker, was a wealthy German sugar refiner who had migrated to London in the 1760s.⁴

With its origins in the sixteenth century, the London sugar industry had long been dominated by German immigrants, many of whom rapidly became

¹ R.L. Arrowsmith, *Charterhouse Register, 1769-1872. With Appendix of Non-Foundations, 1614-1769* (London, Phillimore, 1974), p. 289. John Pedder married Jane Brucker by licence at St Nicholas Cole Abbey, London, on 13 March 1787. 'England Marriages, 1538-1973', *FamilySearch*, <www.familysearch.org> accessed 24 April 2011.

² William was born on 23 January 1796. Jane's year of birth is estimated as 1798 from her age in census data. *Charterhouse Register*, p. 289; Ancestry.com. *1851 England Census* [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2005, *Census Returns of England and Wales, 1851*, The National Archives (hereafter TNA) PRO HO107/1646/355, p. 54.

³ John Pedder (d. 1791) was listed as a 'Merchant, 6, Chatham-place, Blackfriars' and agent 'For Bristol' of the Committee of the African Company. *The Universal British Directory* (London, 1791), pp. 250, 350.

⁴ George Brucker, Letters Patent of Denization, 20 March 1765, TNA C 97/3. 'George Brucker & Son' operated sugar-houses [factories] in Little Distaff Lane, in the parish of St Nicholas Cole Abbey, c. 1771-1815. B. Mawer (ed.), *Sugar Refiners & Sugarbakers Database*, <<http://home.clara.net/mawer/sugarbbry.html>> accessed 18 April 2009.

Anglicised, marrying local women and joining the Church of England.⁵ During the late eighteenth and early nineteenth centuries, the pre-industrial London elite to which Pedder's grandfather belonged forged close associations with the Tory government. These links were reflected in choices about education at public schools and Oxbridge, and in a commitment to Anglicanism.⁶ With his younger brother, Pedder attended Charterhouse, a leading public school which educated the sons of Britain's newly prominent urban classes.⁷ As Lenore O'Boyle points out, public schools absorbed more middle-class pupils during the early nineteenth century. They did not become 'middle-class schools', but continued to follow a 'classical curriculum' and inculcate the 'moral and social values ... of the ruling class'.⁸ Eminent former pupils of Charterhouse filled the highest political, legal and religious offices in England during Pedder's youth, and included the Tory Prime Minister, Lord Liverpool, Lord Chief Justice Ellenborough, and the Archbishop of Canterbury.⁹ In the southern colonies, former schoolmates turned law officers included Alfred Stephen and John Walpole Willis, both of whom had attended Charterhouse during Pedder's time as a pupil.¹⁰

⁵ H. Rössler, 'Germans from Hanover in the British sugar industry, 1750-1900' in S. Manz, M. Schulte Beerbühl and J.R. Davis (eds.), *Migration and Transfer from Germany to Britain, 1660-1914* (Berlin, Walter de Gruyter, 2007), pp. 49-64; and S. Steinmetz, 'The German churches in London, 1669-1914' in P. Panayi (ed.), *Germans in Britain since 1500* (London, The Hambledon Press, 1996), pp. 50, 52.

⁶ W.D. Rubinstein, 'Wealth, elites and class structure in modern Britain', *Past and Present* 76 (1977), pp. 113-114; C. Trebilcock, *Phoenix Assurance and the Development of British Insurance, Volume I: 1782-1870* (Cambridge, Cambridge University Press, 1985), pp. 667-668.

⁷ Arrowsmith, *Charterhouse Register*, p. 289.

⁸ L. O'Boyle, 'The problem of an excess of educated men in Western Europe, 1800-1850', *Journal of Modern History* 42 (4) (1970), p. 486.

⁹ A. Quick, *Charterhouse: A History of the School* (London, James & James, 1990), p. 38. Lord Liverpool, Tory Prime Minister, 1812-1827; Lord Ellenborough, Chief Justice of the King's Bench, 1802-1818; and Charles Manners-Sutton, Archbishop of Canterbury, 1805-1828.

¹⁰ A senior legal officer in Van Diemen's Land and New South Wales, Stephen attended Charterhouse in 1810. Willis held judicial office in New South Wales and Port Phillip between 1838 and 1843. He was expelled from Charterhouse in 1809. M. Rutledge, 'Stephen, Sir Alfred (1802-1894)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/stephen-sir-alfred-1291/text7645>> and J.V. Barry, 'Willis, John Walpole (1793-1877)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/willis-john-walpole-2797/text3989>> accessed 10 August 2011.

One of many urban recruits to the legal profession at the end of the eighteenth century, Pedder's father was admitted to the Middle Temple in 1786.¹¹ Admission to one of the four Inns of Court did not automatically lead to a career as a barrister. Indeed, as David Duman calculates, for the years 1784-1794 only 100 of the 525 admissions to the Middle Temple were later called to the bar.¹² Pedder *père* practised instead as an attorney and money-scrivener, in a varied business enterprise which highlights both the law's close links to the commercial world and the fluidity of contemporary careers in the 'junior' branches of the law.¹³ Pointing to the fundamentally commercial nature of his career, economic historian Julian Hoppit identifies 'attorney' and 'money scrivener' as occupational categories within the finance sector.¹⁴

In the year of Pedder's birth, his father was declared bankrupt. Having dissolved his partnership of 'Attornies [*sic*] and Solicitors' with Frederick Syms in early November 1793,¹⁵ Pedder *père* was 'required to surrender himself' to the Commissioners of Bankrupts and make 'a full Discovery and Disclosure of his Estate and Effects'.¹⁶ Bankruptcy was a 'formal legal status'

¹¹ Duman estimates that the 'lower professions, business and urban gentry' comprised 37 per cent of the bar in 1785. D. Duman, *The English and Colonial Bars in the Nineteenth Century* (London, Croom Helm, 1983), p. 22.

¹² Duman, *The English and Colonial Bars*, p. 28. Bennett conjectures that Pedder *père* was 'disbarred at his own request'; however, no call to the bar appears in the records of the Middle Temple. J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. 7; H.A.C. Sturgess (ed.), *Register of Admissions to the Honourable Society of the Middle Temple: From the Fifteenth Century to the Year 1944, Vol. II* (London, Butterworth for the Honourable Society of the Middle Temple, 1949), p. 400.

¹³ Attorneys and solicitors were socially and professionally subordinate to barristers. In 1794, Pedder *père* advertised as 'Pedder J., jun., Attorney, 9, Wardrobe-place, Doctors'-com', while in 1822 he was listed under 'London attorneys' at 19, Bridge Street, Blackfriars. In the 1790s, he was described as a 'scrivener' or 'money-scrivener'. B. Abel-Smith and R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (London, Heinemann, 1967), pp. 22, 24, 25; *Kent's Directory for the Year 1794. Cities of London and Westminster, & Borough of Southwark* (London, 1794); *Pigot's Directory* (London, 1822), p. viii; and *London Gazette*, 9 November 1793, p. 1009; 22 July 1794, p. 768.

¹⁴ J. Hoppit, *Risk and Failure in English Business, 1700-1800* (Cambridge, Cambridge University Press, 1987), p. 186. A scrivener or money scrivener 'received money to place out at interest, and ... supplied those who wanted to raise money on security'. *OED*.

¹⁵ *London Gazette*, 5 November 1793, p. 984.

¹⁶ *London Gazette*, 9 November 1793, p. 1009.

applied to traders, as distinct from the personal insolvency of non-traders; bankruptcy proceedings constituted a mechanism which offered an alternative to imprisonment for debt, and allowed the bankrupt to resume trading once his debts had been discharged.¹⁷ The bankruptcy proceedings of Pedder père are charted in the London press between November 1793 and June 1795, placing his pecuniary embarrassment firmly in the public domain.¹⁸

John Lewes Pedder's baptism in the Anglican parish church of Bramfield, Hertfordshire, in September 1793 locates the family outside its usual metropolitan base just a month before proceedings began.¹⁹ The village of Bramfield was a 'favourite resort of Londoners' which also served as a refuge for others in financial difficulty.²⁰ Three years after Pedder père found himself before the bankruptcy commissioners, a local diarist recorded that London engraver Joseph Strutt had fled to the village 'to escape the clamour of his creditors'.²¹ It is possible that Pedder père removed the family to Bramfield for reasons of economy or discretion, while he returned to London to repay his debts. A link to Bramfield may also be found in its rector, Rev Edward Bouchier, whose father-in-law, Robert Jenner, was a proctor in Doctor's Commons, where Pedder père practised as a money-scrivener and attorney.²²

¹⁷ D. Milman, *Personal Insolvency Law, Regulation and Policy* (Farnham, Ashgate, 2005), p. 3.

¹⁸ *London Chronicle*, 12 November 1793, p. 1; *True Briton*, 24 December 1793, p. 4; *Whitehall Evening Post*, 18 February 1794, p. 1; and *St James's Chronicle or the British Evening Post*, 23 June 1795, p. 1.

¹⁹ Baptism of John Lewes Pedder, 20 September 1793, St Andrew, Bramfield, Hertfordshire. Society of Genealogists MF 1868, Bramfield: C 1559-1811, M 1559-1839, Banns 1755->1818, B 1559-1768.

²⁰ W.B. Johnson, *The Hertfordshire Pepys: John Carrington, of Bramfield, and his Diary from 1797 to 1810* (Letchworth, Hertfordshire Countryside, 1969), p. 13.

²¹ Johnson, *Hertfordshire Pepys*, p. 13. Carrington's diary begins a few years after the Pedders' sojourn in Bramfield. No other person of that name is mentioned in the text, suggesting there was no family connection to the parish.

²² Johnson, *Hertfordshire Pepys*, p. 32. Pedder's baptismal record identifies him as the son of John and Jane Pedder, 'Inhabitants of Doctor's Commons'. Pedder père practised with Syms at 'Wardrobe-Court, Doctors-Commons', and in his own chambers at '9, Wardrobe-place, Doctors'-com' in 1794. Society of Genealogists MF 1868; *London Gazette*, 5 November 1793, p. 984; *Kent's Directory for the Year 1794*, <<http://www.londonancestor.com/kents/kents-p.htm>> accessed 24 April 2011.

David Milman identifies historical bankruptcy as a ‘central social/economic issue’ which frequently dominated ‘political discourse and the legislative process’.²³ The bankruptcy regime was grounded in social as well as economic goals, and in the turbulent enterprise culture of the late eighteenth and early nineteenth centuries, social attitudes towards bankruptcy were ambiguous: dishonesty and misfortune could both play a role. With increasing financial and industrial innovation in the late eighteenth century, economic cycles were unpredictable. Operating as a money-scrivener in the fluctuating financial sector of the world’s largest imperial entrepôt, Pedder père was vulnerable to broader economic instability.

Pedder’s maternal grandfather, George Brucker – himself a successful entrepreneur in the notoriously volatile sugar industry²⁴ – took steps to secure the financial position of his daughter and her children. In a will written seven years after his son-in-law’s bankruptcy proceedings, Brucker instructed his executors to pay the proceeds of investments ‘into the proper [own] Hands of my Daughter Jane Peddar [*sic*] for her own sole, separate and particular use and benefit and so as not to be in anywise subject or liable to the Debts, Controul [*sic*], Forfeiture, Disposal or Enjoyment of her present Husband or any future Husband’.²⁵ The influence of the Bruckers – and possibly reaction against his father’s business practices – seem to have informed Pedder’s cautious approach to financial dealings, just as legacies from his mother’s family provided the basis for his personal investments. At the time of his death in 1859, Pedder held valuable shares in Phoenix and Pelican, large sister assurance companies originally established by sugar refiners, which provided sound returns on conservative investments.²⁶

²³ Milman, *Personal Insolvency Law*, pp. 3, 7.

²⁴ On its volatility, see R. Pares, ‘The London sugar market, 1740-1769’, *Economic History Review*, New Series 9 (2) (1956), pp. 261-262; Trebilcock, *Phoenix Assurance*, pp. 15-22.

²⁵ Will of George Brucker, Esquire, of Clapham Common, Surrey, dated 8 March 1800, proved 5 May 1800, TNA PROB 11/1341.

²⁶ Phoenix Assurance Company, PL23 Share Ledger, 1797-1891 (Pelican Insurance Company index to share transactions); PX26 Share Register Journal, 1854-62, Cambridge University Library Manuscripts Department; Will of Sir John Lewes Pedder, of 8, Bedford Square, Brighton, Sussex, dated 3 March 1859, proved 13 April 1859, Her Majesty’s Courts Service.

Historian of the companies, Clive Trebilcock, notes that Phoenix shares were 'privileged possessions, belonging to a closed band': George Brucker's sugar houses in Little Distaff Lane had been among the first insured by Phoenix in 1782, and shares were inherited by his descendants.²⁷

The financial insecurity of Pedder's father notwithstanding, the social mobility of the Brucker and Pedder families is illustrated in the 'gentrification' of London businessmen, whose sons and grandsons acquired the status of gentleman through careers in the law and the army.²⁸ As in so many other British families, the contemporary 'expectation of upward mobility' was achieved through education at a public school, Oxbridge or the Inns of Court, and entry into the upper-class professions.²⁹ As the eldest son,³⁰ Pedder trained as a barrister, while his younger brother became an army officer, ultimately purchasing a captaincy in the 63rd Regiment of Foot in 1830.³¹ The Bruckers and Pedders also replicated the rural lifestyles of the gentry, as they moved further from the City and their places of work. George Brucker progressively moved his family from the sugar house district of Little Distaff Lane, to then-rural Peckham and Clapham.³² Pedder *père* retired from the central London parish of Blackfriars to Lewisham Village in Kent,³³ while many of Pedder's financially independent female relatives on both sides of

²⁷ Trebilcock, *Phoenix Assurance*, pp. 340, 718.

²⁸ Rubinstein, 'Wealth, elites and class structure in modern Britain', pp. 113-114, 122.

²⁹ O'Boyle, 'The problem of an excess of educated men', p. 486; R.S. Neale, *Class and Ideology in the Nineteenth Century* (London, Routledge & Kegan Paul, 1972), pp. 116-117.

³⁰ British families had 'high expectations' of eldest sons, and 'parents in the middling strata' devoted particular attention to their education and career. Neale, *Class and Ideology in the Nineteenth Century*, p. 117.

³¹ Joining the 63rd regiment as an ensign in 1825, William Pedder was promoted lieutenant in 1826, and captain, by purchase, in 1830. *London Gazette*, 16 April 1825, p. 649; 19 January 1827, p. 131; and 3 August 1830, pp. 1685-1686.

³² Brucker's wife, Jane, died 'at his house at Peckham' in 1776. At the time of his own death in 1800, George Brucker occupied a 'Genteel leasehold dwelling house' with pleasure ground and garden 'situate near the Grove on the North-side of Clapham Common'. *London Evening Post*, 18 May 1776, p. 4; *Morning Chronicle*, 18 September 1800, p. 5.

³³ Six and a half miles south-west of London, Lewisham was 'thickly studded with gentlemen's seats ... numerous handsome villas' and 'the country residences of opulent merchants'. S. Lewis (ed.), 'Levenshulme - Lewisham', *A Topographical Dictionary of England* (1848), pp. 74-78, <<http://www.british-history.ac.uk/report.aspx?compid=51105>> accessed 25 April 2009.

the family made their homes in the fashionable seaside resort of Brighton.³⁴

Pedder advanced his personal transition to gentlemanly status by training as a barrister. Maintaining the social homogeneity of the bar remained a primary consideration into the early nineteenth century, so that professional competence was but one qualification. Published in a second edition in 1818, Thomas Ruggles' *The Barrister, or Strictures on the Education Proper for the Bar* advised aspiring barristers of Pedder's generation that 'any man' who sought to

fill with decorum one of the higher offices of the MAGISTRACY, and to take a respectable station among the most elevated ranks of society, should be grounded in every acquisition of liberal science, and polished by easy and gentlemanly deportment, which nothing but habitual intercourse with men of literature and fashion can effect.³⁵

Ruggles' strictures highlight the importance of a liberal education and fashionable manners for the would-be gentleman-lawyer: Pedder's classical education and assimilation of elite values at Charterhouse provided a vital foundation for success in his chosen profession.

Formal study of the law centred on the universities and the four 'gatekeeping' Inns of Court in London.³⁶ Their educational function having declined during the previous century, the Inns of Court became 'little more than residential clubs'; nonetheless, under regulations of 1762, the 'socially powerful practice' of dining at the Inns was essential for admission to the bar.³⁷ Under professional challenge from lower-ranking solicitors and attorneys, the Inns

³⁴ See Chapter 2.

³⁵ T. Ruggles, *The Barrister, or Strictures on the Education Proper for the Bar. Second Edition, Corrected* (Littleton, Colo., Fred B. Rothman & Co, 1995; originally published London, W. Clarke/Cambridge, J. Deighton, 1818), pp. 23-24; D. Lemmings, 'Ritual, majesty and mystery: Collective life and culture among English barristers, serjeants and judges, c. 1500-c. 1830' in W.W. Pue and D. Sugarman (eds.), *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford and Portland, Oregon, Hart Publishing, 2003), pp. 57-58.

³⁶ Lemmings, 'Ritual, majesty and mystery', p. 58.

³⁷ Duman, *The English and Colonial Bars*, p. 24; Abel-Smith and Stevens, *Lawyers and the Courts*, pp. 17, 25; R. Selleck, *The Shop: The University of Melbourne 1850-1939* (Melbourne, Melbourne University Press, 2003), pp. 59-60.

pursued a policy of ‘social segregation’, and, as David Lemmings points out, ‘social elitism’ outweighed ‘educational utility’ as the focus of legal training moved away from a ‘clerical apprenticeship’ with an attorney towards an Oxbridge education and pupillage with a barrister.³⁸ This favoured path was pursued by Pedder.



Figure 2: Middle Temple Hall, c. 1830.³⁹

Pedder entered Trinity Hall, Cambridge, in 1810, graduating with a Bachelor of Civil Law in 1822.⁴⁰ Simultaneously, from his admission to the Middle Temple in 1813 to his call to bar in 1820,⁴¹ Pedder undertook applied training in English law. He spent ‘three years’ in the chambers of conveyancing barrister, Henry Bellenden Ker, at Lincoln’s Inn;⁴² then, ‘intending to practise at the Chancery Bar’, completed his pupillage under

³⁸ Lemmings, ‘Ritual, majesty and mystery’, pp. 57, 60.

³⁹ T. Shepherd, Middle Temple Hall, c.1830, <http://commons.wikimedia.org/wiki/File:Middle_Temple_by_Thomas_Shepherd_c.1830.jpg> accessed 22 September 2009.

⁴⁰ J. Venn and J.A. Venn (eds.), *Alumni Cantabrigienses: A Biographical List of all known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900*, part 2, vol. 5 (Cambridge, Cambridge University Press, 1953), p. 72.

⁴¹ Sturges, *Register of Admissions*, p. 432.

⁴² Ker to Pedder, 6 March 1823, CO 323/118, f. 454, AJCP reel PRO 934.

equity barrister, John Newland, at the Inner Temple.⁴³

Recalling his experience as Henry Ker's pupil a generation later, lawyer and social activist, John Ludlow, offers some insights to the probable mode of Pedder's training, and the character of his mentor.⁴⁴ Ludlow's autobiography vividly evokes the 'short, rotund, rubicund, quick, talkative, [and] irascible' Ker.⁴⁵ 'I soon found out', he wrote,

that Mr Ker's chambers were a place where one was expected to learn without being taught, but where nevertheless one could learn a good deal by finding out how. If even after the most careful reading one felt a difficulty as to some legal point, there was no use in asking Mr Ker; he would tell you sharply that it was your business to find out.⁴⁶

Ker possessed a 'caustic wit' and 'would tolerate neither dullards nor fools'.⁴⁷ He would sometimes 'pour forth an unstinted flow of legal lore, so long as you simply listened', but the more usual 'process of learning' involved reading 'textbooks at home' and copying out manuscript precedents used in chambers 'in a book of your own'.⁴⁸ 'After a time', Ludlow explained, 'a draft was given to you to draw, or an abstract to read and make marginal notes on in pencil, without the slightest explanation'.⁴⁹ When the pupil-master came to settle the draft or peruse the abstract, pupils were 'called into Mr Ker's room' or, 'if he did either at home, it was handed back to you with his own corrections'.⁵⁰ By the time Ludlow was called to the bar in 1843, Ker was conveyancing counsel to the Board of Trade as well as an active member of statute law reform commissions and various cultural and scientific

⁴³ Newland to Pedder, 6 March 1823, CO 323/118, f. 450, AJCP reel PRO 934. Newland was the author of *The Practice of the High Court of Chancery* (London, J. Butterworth, 1813).

⁴⁴ E.R. Norman, 'Ludlow, John Malcolm Forbes (1821-1911)', rev. H.C.G. Matthew, *Oxford Dictionary of National Biography*, Oxford University Press, 2004
<<http://www.oxforddnb.com/view/article/37696>> accessed 13 September 2011.

⁴⁵ A.D. Murray (ed.), *John Ludlow: The Autobiography of a Christian Socialist* (London, Frank Cass, 1981), p. 41.

⁴⁶ Murray, *John Ludlow*, p. 42.

⁴⁷ Murray, *John Ludlow*, p. 52.

⁴⁸ Murray, *John Ludlow*, p. 42.

⁴⁹ Murray, *John Ludlow*, p. 42.

⁵⁰ Murray, *John Ludlow*, p. 42.

societies.⁵¹ It is unclear whether Ker's teaching style had changed in the twenty years since Pedder had been his pupil, but Ludlow's account highlights the self-directed learning and textual focus that Pedder is likely to have experienced at the Inns of Court.

Two years before he graduated from Cambridge, Pedder's pupillage at the Inns of Court equipped him with the skills to practise as a barrister in London, but his experience at university was also essential to becoming one of Ruggles' properly educated barristers. Emphasising the intersecting professional and social dimensions of a legal education, Thomas Le Blanc, Master of Trinity Hall, Cambridge, praised Pedder's 'character as a Scholar and a Gentleman' more or less on an equal footing.⁵² Echoing Ruggles, Le Blanc acknowledged Pedder's 'talents' and 'conduct' at university, but it was his 'manly and gentlemanly manners' that gave him confidence in Pedder's career prospects.⁵³ Acceptance by a conservative and elitist legal establishment demanded both professional and social conformity: Pedder's status as a barrister (and therefore a gentleman) was duly confirmed with his call to the bar at the Middle Temple on 16 June 1820.⁵⁴

By 1823, with his legal training complete, Pedder occupied chambers at 3, Brick Court, Temple, where he was probably engaged in conveyancing and equity draughtsmanship while he built up his practice.⁵⁵ Pedder did not belong to an established legal family, but would have profited from the professional networks of his father and the Inns of Court. Advertising for

⁵¹ Murray, *John Ludlow*, p. 42; W.R. Cornish and D.J.A. Cairns, 'Ker, (Charles) Henry Bellenden (c. 1785–1871)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Oct 2006, <<http://www.oxforddnb.com/view/article/15447>> accessed 9 August 2007.

⁵² Le Blanc to Pedder, 6 March 1823, CO 323/118, f. 452, AJCP reel PRO 934; 'Obituary of Thomas Le Blanc', *Gentleman's Magazine* 19 (1843), pp. 434–435.

⁵³ Le Blanc to Pedder, 6 March 1823, CO 323/118, f. 452a, AJCP reel PRO 934; Ruggles, *The Barrister*, p. 25.

⁵⁴ Sturgess, *Register of Admissions*, p. 432.

⁵⁵ Pedder's application to the Colonial Office was addressed from 3, Brick Court, Temple. Pedder to Wilmot Horton, 8 March 1823, CO 323/118, f. 446, AJCP reel PRO 934; Duman, *The English and Colonial Bars*, p. 84.

business breached the conventions of the bar, so barristers relied upon personal and professional connections. As an attorney, Pedder's father was possibly one of his 'most useful' contacts.⁵⁶ Indeed, O'Boyle has identified 'a growing practice among attorneys of training one son for the bar [so that] he could then count on all the business of his family and friends'.⁵⁷ The small scale of the practising bar meant that professional opportunities in London were severely limited, however. Duman calculates that only 840 barristers made their living at the bar in 1820, whereas, in the previous decade alone, 2,077 prospective barristers had been admitted to the Inns of Court.⁵⁸ Not everyone admitted to the Inns intended to enter legal practice; nonetheless, 'gross overcrowding' remained a feature of the bar.⁵⁹

The Barrister reflects on the difficulties faced by young men like Pedder. As Ruggles explains, the fledgling barrister, who had 'received that education which alone becomes the dignity of his profession', faced stiff competition.⁶⁰ 'So great is the influx of men who have not received the education of a *scholar and a gentleman*', he cautions, that, 'in the first years of his calling' the properly educated barrister would struggle to attain 'early profits ... unless his abilities are eminently superior to those of his competitors, and his luck keeps pace with his abilities'.⁶¹ It is not possible to speculate on the success of Pedder's practice, but the correspondence of his ambitious contemporary, John Macarthur junior, indicates that his London practice did not generate an adequate income four years after his call to the bar.⁶² Indeed, throughout the nineteenth century, barristers' incomes remained erratic and many 'average'

⁵⁶ Duman, *The English and Colonial Bars*, pp. 89-91.

⁵⁷ O'Boyle, 'The problem of an excess of educated men', p. 479.

⁵⁸ Duman, *The English and Colonial Bars*, pp. 7, 25.

⁵⁹ Duman, *The English and Colonial Bars*, p. 8; O'Boyle, 'The problem of an excess of educated men', pp. 479-480, 484.

⁶⁰ Ruggles, *The Barrister*, p. 25.

⁶¹ Ruggles, *The Barrister*, p. 25. Editorial emphasis.

⁶² John Macarthur junior to John Macarthur, 8 December 1822, cited in H. King, *Colonial Expatriates: Edward and John Macarthur Junior* (Sydney, Kangaroo Press, 1989), pp. 19, 25-26. Younger son of John Macarthur, leader of the 'exclusives' in New South Wales, John Macarthur junior (1794-1831) attended Caius College, Cambridge, and was called to the bar in 1818.

barristers had annual earnings within the hundreds, rather than thousands, of pounds, even a generation or two after Pedder was lured to the colonial judiciary by the prospect of £1,200 a year.⁶³

1.2 An 'applicant for the vacant Office of Judge at Van Diemen's Land'

Existing accounts deal cursorily with Pedder's application for colonial appointment. Correspondence with the Colonial Office reveals nothing of his reasons for pursuing judicial office, and historians of Van Diemen's Land/Tasmania do not speculate on his possible motivations. Legal historians gloss over Pedder's appointment as marginal to his judicial career proper, and analysis is framed by narrowly professional concerns. As a result, Pedder is uncritically cast as either 'eminently suitable' or an 'eccentric' choice.⁶⁴ By way of corrective, this section maps Colonial Office selection procedures, and the range of motives articulated by Pedder's peers, through a close reading of contemporary applications for appointment to law offices in Van Diemen's Land and New South Wales in 1823.

The early 1820s marked a return to relative social and political calm in England after a strained transition to peace, following the final defeat of Napoleon in 1815.⁶⁵ Economic conditions, however, were challenging: the cost of living remained high and demobilisation increased competition for employment, especially among the professional classes. In response to continuing radical critique of 'Old Corruption' and the oppressive levels of taxation which had sustained the war effort, the imperial government also faced pressure for retrenchment and reform.⁶⁶ In this climate, Zoë Laidlaw

⁶³ A.H. Manchester, *A Modern Legal History of England and Wales, 1750-1950* (London, Butterworths, 1980), pp. 73-74. Available information suggests that many 'second or third rate' barristers were earning between £500 and £1,500 a year as late as 1874.

⁶⁴ See, for example, Bennett, *Sir John Pedder*, pp. 8-9; J.N.D. Harrison (ed.), *Court in the Colony: Hobart Town, May, 1824* (Hobart, Law Society of Tasmania, 1974), p. 20; R.W. Baker, 'The early judges in Tasmania', *Tasmanian Historical Research Association Papers and Proceedings* 8 (4) (1960), p. 72.

⁶⁵ A. Burns and J. Innes, 'Introduction' in A. Burns and J. Innes (eds.), *Rethinking the Age of Reform: Britain 1780-1850* (Cambridge, Cambridge University Press, 2003), p. 28. Britain had fought a series of campaigns against the French from 1799.

⁶⁶ P. Harling, 'Parliament, the state, and "Old Corruption": Conceptualising reform,

identifies a 'pseudo-gentry' of financially insecure, landless professionals who sought colonial appointment as the means to maintain a genteel lifestyle.⁶⁷ While some became permanent economic migrants, others sought respite in temporary employment outside England.

Applicants for colonial appointment considered a range of British colonies, including Upper Canada, Mauritius, and the Cape Colony. Lucrative positions in British India were also prized by those willing to endure the tropical climate. With the publication of the *Bigge Report* in 1822 and 1823, the southern colonies of New South Wales and Van Diemen's Land became the focus of renewed interest in Britain. Published in three volumes by the House of Commons, the reports of J.T. Bigge's Commission of Inquiry provided a comprehensive, up-to-date account of colonial conditions for the first time.⁶⁸ In transition from their origins as penal settlements, the two colonies were now promoted to voluntary emigrants. Economic expansion was underpinned by Indigenous dispossession and the bonded labour of convicts, and colonists with capital to invest were attracted by grants of land, other indulgences, and by the belief that life in the colonies was more economical.⁶⁹ To this was added the advantage of a salubrious climate, especially in temperate maritime Van Diemen's Land.⁷⁰

c. 1790-1832' in Burns and Innes, *Rethinking the Age of Reform*, p. 106. The legal establishment was 'largely self-financing', but remained a target for the critics of 'Old Corruption' as much of the income of judges and court officials came not from salaries, but fees. M. Lobban, "Old wine in new bottles": The concept and practice of law reform, c. 1780-1830' in Burns and Innes, *Rethinking the Age of Reform*, p. 122.

⁶⁷ Z. Laidlaw, *Colonial Connections, 1815-45: Patronage, the Information Revolution and Colonial Government* (Manchester, Manchester University Press, 2005), p. 102.

⁶⁸ *The State of the Colony of New South Wales*, 19 June 1822 (House of Commons Paper 448); *The Judicial Establishments of New South Wales and of Van Diemen's Land*, 21 February 1823 (House of Commons Paper 33); and *The State of Agriculture and Trade in the Colony of New South Wales*, 13 March 1823 (House of Commons Paper 136).

⁶⁹ Grants were proportionate to a settler's capital. Indulgences included victualling, convict labour, and livestock on credit. L.L. Robson, *A History of Tasmania, Volume I: Van Diemen's Land from the Earliest Times to 1855* (Melbourne, Oxford University Press, 1983), pp. 111-115; Laidlaw, *Colonial Connections*, p. 103.

⁷⁰ The healthy climate was popularised in Britain in articles like [J. Barrow], 'A geographical, historical, and topographical description of Van Diemen's Land, with important hints to emigrants, and useful information respecting the application for grants of land', *Quarterly Review* 27 (53) (1822), pp. 99-110.

During the 1820s, applications for colonial appointment were directed to Robert Wilmot Horton, Undersecretary of the Colonial Office,⁷¹ and ultimately approved by the Secretary of State for the Colonies, Lord Bathurst.⁷² In an age of recruitment by personal recommendation, selection procedures favoured early application from prospective candidates: as a result, the 'merest rumour' of a colonial vacancy could stimulate enquiries.⁷³ Correspondence relating to the Australian colonies between 1819 and 1823 reveals a number of personal and professional reasons for seeking employment outside England.⁷⁴ While some expressed interest in particular postings, most applicants sought general assistance from the Colonial Office, indicating their capacity for a variety of tasks or expressing interest in several positions.

In July 1823, therapeutic émigré, Edward Butler, made a general application for assistance, confessing that 'permanent residence abroad is absolutely essential to the establishment of my health'.⁷⁵ A bookseller and tax collector, Butler emphasised his willingness to embark upon any colonial employment. As he reassured the Colonial Office, 'My life having been devoted to active pursuits together with my general knowledge of business and accounts, I presume there are very few departments where I should feel myself a stranger'.⁷⁶ Under the patronage of Lord Auckland, the consumptive Butler

⁷¹ Parliamentary Undersecretary of the Colonial Office, 1821-1827, Robert Wilmot assumed the additional name of Horton by royal licence in May 1823, but for the sake of consistency is referred to as Wilmot Horton throughout. E. Richards, 'Horton, Sir Robert John Wilmot-, third baronet (1784-1841)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Jan 2008 <<http://www.oxforddnb.com/view/article/13827>> accessed 23 September 2009.

⁷² Bathurst was Secretary of State for the Colonies, 1812-1827, in the Tory ministry. N. Thompson, 'Bathurst, Henry, third Earl Bathurst (1762-1834)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Jan 2008 <<http://www.oxforddnb.com/view/article/1696>> accessed 23 September 2009.

⁷³ Laidlaw, *Colonial Connections*, p. 105.

⁷⁴ Applications for Colonial Appointments, 1819-1822, CO 323/117, and Applications for Colonial Appointments, 1823, CO 323/118, AJCP reel PRO 934.

⁷⁵ Butler to Wilmot Horton, 1 July 1823, CO 323/118, f. 66a, AJCP reel PRO 934; P. Howell, 'Shovelling out distressed gentlefolk? A reconsideration of the Colonial Office's use of its powers of patronage in Van Diemen's Land' in G. Winter (ed.), *Tasmanian Insights. Essays in Honour of Geoffrey Thomas Stilwell* (Hobart, State Library of Tasmania, 1992), pp. 67-70.

⁷⁶ Butler to Wilmot Horton, 1 July 1823, CO 323/118, f. 67, AJCP reel PRO 934.

secured appointment as Registrar of the Supreme Court of Van Diemen's Land, but died en route to the colony.⁷⁷

Writing to Wilmot Horton in August 1823, barrister, Joseph Hone, sought assistance to proceed to Van Diemen's Land 'to practise at the bar'.⁷⁸ He had already made 'more than one application' for assistance.⁷⁹ Having been informed in 1822 that there was 'no probability of a situation' in the colonies,⁸⁰ he tried another tack in 1823. This time, Hone applied for passage for his family to Van Diemen's Land 'on the same Terms, as to expense, as the public Officers of His Majesty's Government'.⁸¹ With a wife and three children to support, the struggling barrister confessed that he had 'no other plea to urge in support of this application than that of Poverty'.⁸² Hone offered to reimburse the cost of his passage by 'performing any Business for the Colonial Government gratuitously' until he had 'worked out the pecuniary Amount of the obligation'.⁸³ With several vacancies created by the imminent foundation of the Supreme Court of Van Diemen's Land, Hone's supplication was successful. By early October, he was writing again to 'thankfully accept' the unsolicited situation of Master of the Supreme Court.⁸⁴

There is no evidence that Pedder had considered colonial appointment before his application of March 1823.⁸⁵ His judicial biographer, J.M. Bennett, speculates that the young barrister 'thought upon a new career in the British

⁷⁷ Butler to Wilmot Horton, 9 September 1823, CO 323/118, ff. 94-94a, AJCP reel PRO 934; Sorell to Bathurst, 6 May 1824, *HRA* III, IV, p. 128; *Hobart Town Gazette*, 23 April 1824, p. 2.

⁷⁸ Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 294, AJCP reel PRO 934; P. Crisp, 'Hone, Joseph (1784-1861)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/hone-joseph-2195/text2833>> accessed 1 August 2011.

⁷⁹ Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 294, AJCP reel PRO 934.

⁸⁰ William Courtenay to Bathurst, 12 April 1822; Courtenay to Wilmot Horton, 12 April 1822; and marginal note, CO 323/118, ff. 50-52a, AJCP reel PRO 934; Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 294a, AJCP reel PRO 934.

⁸¹ Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 294a, AJCP reel PRO 934.

⁸² Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 294a, AJCP reel PRO 934.

⁸³ Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 295, AJCP reel PRO 934.

⁸⁴ Hone to Wilmot Horton, 1 October 1823, CO 323/118, f. 302, AJCP reel PRO 934.

⁸⁵ Pedder to Wilmot Horton, 8 March 1823, CO 323/118, ff. 446-447, AJCP reel PRO 934; Applications for Colonial Appointments, 1819-1822, CO 323/117; and Applications for Colonial Appointments, 1823, CO 323/118, AJCP reel PRO 934.

Colonies' in 1823, following the death of his father.⁸⁶ A search of English civil registration records reveals, however, that Pedder *père* did not die until 1844, more than twenty years after his son's appointment as chief justice.⁸⁷ In a letter written on black-edged mourning paper in April 1845, Lady Pedder confirmed the recent death of her father-in-law, telling a family friend that she had received a letter from her sister-in-law in England, which 'came with a box of mourning things (for Sir John Pedder's Father)'.⁸⁸ If a death in the family did stimulate Pedder's interest in a colonial career, it is more likely to have been that of his mother, Jane, who died at Brighton in January 1823.⁸⁹

The year 1823 was significant in another way for Pedder *père*. Having begun his involvement with the Gas Light and Coke Company as company solicitor by 1808, Pedder's father helped to obtain a Royal Charter of Corporation.⁹⁰ In 1812, he was rewarded for his 'constant diligence, solicitude and ability throughout the various proceedings' with appointment as company secretary at a salary of £500 per annum.⁹¹ In 1823, his association with the firm ended abruptly, however, when it was discovered that 'Mr Secretary Pedder' had been embezzling company funds.⁹² As an 'awful example to others who might be tempted to copy his lead', the cheque for three months' salary then due was 'solemnly burnt before the whole Court [board] of Directors by the Governor'.⁹³ Pedder *père* was only one of several embezzlers whose activities

⁸⁶ Bennett, *Sir John Pedder*, p. 8. Bennett concludes it 'seems likely' that Pedder's father died in 1823 as his name no longer appeared in the London directories.

⁸⁷ Certified entry of death, John Pedder, Esquire, died 1 November 1844, General Register Office December Quarter 1844, Lewisham, vol. 5, p. 233, no. 432.

⁸⁸ Maria Pedder to Jane Clark, 12 April 1845, University of Tasmania Special Collections, Royal Society of Tasmania Library Collection (hereafter RS), RS8/F44. Internal evidence supplies the date of Jane Pedder's letter. Maria quotes a paragraph in which Jane Pedder recounts that Jane Clark's sister, Mrs Weston, 'very kindly called on me today (Novr 18th)'. The death of 'John Pedder, Esq. of the Middle Temple, in his 82nd year' was also reported without reference to the date or place in *Jackson's Oxford Journal*, 4 January 1845, p. 4.

⁸⁹ *European Magazine and London Review* 83 (January 1823), p. 90; *Gentleman's Magazine, and Historical Chronicle: From January to June 1823* 93 (1) (1823), p. 94.

⁹⁰ S. Everard, *The History of the Gas Light and Coke Company, 1812-1949* (London, Ernest Benn, 1949), pp. 23, 24. The company was the first commercial supplier of gas for lighting in London.

⁹¹ Everard, *History of the Gas Light and Coke Company*, pp. 21, 25, 27.

⁹² Everard, *History of the Gas Light and Coke Company*, p. 108.

⁹³ Everard, *History of the Gas Light and Coke Company*, p. 108.

were discovered in the early 1820s,⁹⁴ but the company rarely prosecuted. Instead, embezzlers were dismissed and moneys recovered via the sureties required of staff at the time of their appointment.⁹⁵ It is unclear, then, whether this potentially transportable offence became public knowledge.⁹⁶ Pedder *père* was aged in his early 60s in 1823, and his dismissal might have looked like retirement.

With the exception of this incident, Pedder's family circumstances offer no immediate motive for seeking colonial appointment. While the 'ill health' of William Pedder must have caused concern during the 1810s and early 1820s,⁹⁷ the family was apparently able to support Pedder's younger brother and unmarried sister. Unlike many of his peers, Pedder was a single man with no large family to support, and, while uncertain career prospects may be inferred from the broader state of the metropolitan legal profession, his correspondence gives no indication that he was in the immediate distress of his contemporary, Hone.⁹⁸ Unaware of any particular catalyst – or writing deliberately for Colonial Office consumption – Pedder's former pupil-master, Henry Ker, told his protégé that, 'I only regret that any thing should have happened to make a situation out of England desirable to you'.⁹⁹ If Pedder *père* had supported his son's practice at the bar by providing briefs, the end of his career might well have represented an opportune moment for Pedder *fils* to avoid embarrassment at home, establish himself independently, and explore the new professional and financial opportunities presented by developments in the southern colonies.

⁹⁴ Two other embezzlers were discovered in 1822, and 'a spate of embezzlements of serious proportions' followed in 1824. Everard, *History of the Gas Light and Coke Company*, p. 108.

⁹⁵ Everard, *History of the Gas Light and Coke Company*, pp. 118-120.

⁹⁶ Under Acts of 1800 and 1823, thefts by employees from their masters were punishable by transportation; earlier statutes had prescribed the death penalty for particular forms of embezzlement. C. Emsley, T. Hitchcock and R. Shoemaker, 'Crimes tried at the Old Bailey: Explanations of types and categories of indictable offences', *Old Bailey Proceedings Online*, <<http://www.oldbaileyonline.org/static/Crimes.jsp>> accessed 27 May 2011.

⁹⁷ William Pedder's 'ill health' between 1811 and 1825 is recorded in Arrowsmith, *Charterhouse Register*, p. 289.

⁹⁸ Butler to Wilmot Horton, 1 July 1823, CO 323/118, f. 66a, AJCP reel PRO 934; Hone to Wilmot Horton, 30 August 1823, CO 323/118, f. 294a, AJCP reel PRO 934.

⁹⁹ Ker to Pedder, 6 March 1823, CO 323/118, f. 454, AJCP reel PRO 934.

In early 1823, in consultation with Commissioner Bigge and colonial lobbyists, the Colonial Office was preparing legislation to reform the administration of justice in New South Wales and Van Diemen's Land. The creation of two new, discrete Supreme Courts was intended to separate the civil and criminal jurisdictions of the sister colonies. For the first time, Van Diemen's Land would have its own superior court, with the power to try capital offences locally. With its close ties to government, the legal profession in London took a keen interest in the professional opportunities generated by the *New South Wales Act* of 1823.¹⁰⁰ Indeed, in his *Report on the Judicial Establishments*, published in February, Commissioner Bigge anticipated that the 'prospect of professional emolument must of itself afford encouragement to practitioners to repair to Van Diemen's Land from England, whenever the establishment of a separate judicature shall be announced'.¹⁰¹

A fortnight after Bigge's report was published, Pedder submitted his application to the Colonial Office. It comprised three components: the personal recommendation of patrons; a brief letter of application; and the testimonials of academic and professional referees. In a deferential expression of interest, dated 8 March 1823, he told Wilmot Horton:

Tho' I believe Mr Holmes and Mr Bonham and Mr George Banks have done me the honour to mention my name to you as an applicant for the vacant Office of Judge at Van Diemen's Land, I apprehend it is proper, that a direct application should be made by myself.¹⁰²

In the belief that Tory MP, George Banks, had sent his professional 'testimonials' to the Colonial Office the previous day, Pedder concluded his succinct letter with the hope that, if Wilmot Horton should 'find my testimonials a sufficient recommendation you will do me the honour to lay

¹⁰⁰ 4 Geo. IV, c. 96, *An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto* (1823).

¹⁰¹ J.T. Bigge, *The Bigge Reports Volume 2. Report of the Commission of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land, 1823* (Adelaide, Libraries Board of South Australia, 1966), p. 59.

¹⁰² Pedder to Wilmot Horton, 8 March 1823, CO 323/118, f. 446, AJCP reel PRO 934.

my application before the Earl of Bathurst for his approval'.¹⁰³ In fact, Pedder learned – when Bankes' brother returned the testimonials to him two days later – that George Bankes 'did not think it necessary to transmit' them.¹⁰⁴ Combined with Bankes' confidence, Pedder's anticipation of Lord Bathurst's 'approval' (rather than consideration) of his application raises the possibility that it was purely a formality. By comparison, Pedder's friend and fellow Chancery barrister, Saxe Bannister, wrote more tentatively to Wilmot Horton of his 'pretensions', and 'beg[ed] the favour of your laying this letter before Earl Bathurst'.¹⁰⁵

Bannister made a number of applications to the Colonial Office between March and May 1823.¹⁰⁶ A half-pay officer since 1814, he had exhausted all hope of securing full-time military appointment before applying to the Colonial Office.¹⁰⁷ With no prospect of a commission in the army, he informed Wilmot Horton that he had been 'advised to tender [his] services ... in a judicial or other legal character in the southern colonies'.¹⁰⁸ His correspondence indicates that he kept abreast of government policy discussions during the preparation of the *New South Wales Act*. He was willing to accept appointment in several colonies and in various capacities, and had 'been informed' that the imperial government had not yet determined whether to send a 'junior judge' or attorney-general to New

¹⁰³ Pedder to Wilmot Horton, 8 March 1823, CO 323/118, ff. 446-447, AJCP reel PRO 934.

¹⁰⁴ Pedder to Wilmot Horton, 10 March 1823, CO 323/118, ff. 448-448a, AJCP reel PRO 934. Pedder took the 'liberty of submitting them' to Wilmot Horton's 'attention' himself, as they were 'the best recommendations' he could 'produce'.

¹⁰⁵ Bannister to Wilmot Horton, [?] March 1823, CO 323/118, ff. 29-30, AJCP reel PRO 934.

¹⁰⁶ Bannister to Wilmot Horton, [?] March 1823; 19 March 1823; 1 April 1823; and 31 May 1823, CO 323/118, ff. 29-30, 33, 37-38, 45-46, and 54-55, AJCP reel PRO 934; D. Wilson, 'Bannister, Saxe (1790-1877)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Jan 2006 <<http://www.oxforddnb.com/view/article/1318>> accessed 12 May 2008.

¹⁰⁷ Bannister to Wilmot Horton, [?] March 1823; and 1 April 1823, CO 323/118, ff. 29-29a, 37a, AJCP reel PRO 934. After becoming a volunteer officer in 1813, his military career was cut short by Wellington's victory at Waterloo. C.H. Currey, 'Bannister, Saxe (1790-1877)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/bannister-saxe-1738/text1919>> accessed 1 August 2011.

¹⁰⁸ Bannister to Wilmot Horton, [?] March 1823, CO 323/118, f. 29, AJCP reel PRO 934.

South Wales.¹⁰⁹ Acknowledging that his Chancery qualifications would be 'most useful in a colony where the civil law is still adhered to', Bannister indicated a preference for the Cape of Good Hope or Mauritius, but undertook to 'devote myself whilst in Europe, to the study of what is peculiar to the colony to which I may be sent'.¹¹⁰ Significantly – and probably in order to avoid competing with his friend – Bannister stated clearly that 'I do not apply for the vacant judicial post at Van Diemen's Land'.¹¹¹

Bannister did not limit his interest to legal or judicial appointments. Reflecting his lifelong humanitarian interest and advocacy for indigenous peoples across empire, he made a second application in May, requesting that he be sent as commissioner 'to the Canadas to inquire into the condition of the aborigines'.¹¹² If the government decided to conduct the enquiry 'without a special mission', Bannister offered his services as attorney-general in New South Wales instead.¹¹³

Like Pedder, Bannister had been a pupil of Henry Ker. Having been called to the bar only a year earlier than his friend, he also had limited professional experience.¹¹⁴ Writing to Wilmot Horton in May 1823, Bannister confided his hope that it would 'not be thought an objection that I should be almost

¹⁰⁹ Bigge had recommended the appointment of an attorney-general to separate the duties of 'accuser, judge and juror, in the person of the judge advocate'. Bigge, *Second Report*, p. 56.

¹¹⁰ Bannister to Wilmot Horton, [?] March 1823, CO 323/118, ff. 29-30a, AJCP reel PRO 934.

¹¹¹ Bannister to Wilmot Horton, [?] March 1823, CO 323/118, f. 30a, AJCP reel PRO 934.

¹¹² Bannister to Wilmot Horton, 29 May 1823, CO 323/118, f. 45, AJCP reel PRO 934. Already an advocate for Indigenous people from North America, he was later a founding member of the Aborigines' Protection Society. E. Elbourne, 'Family politics and Anglo-Mohawk diplomacy: The Brant family in imperial context,' *Journal of Colonialism and Colonial History* 6 (3) (2005), paras 13, 38-40, and 'The sin of the settler: The 1835-36 Select Committee on Aborigines and debates over virtue and conquest in the early nineteenth-century British white settler empire', *Journal of Colonialism and Colonial History* 4 (3) (2003), para 29, <http://www.press.jhu.edu/journals/journal_of_colonialism_and_colonial_history/> accessed 10 June 2009. While at the Cape Colony, Bannister compiled his most substantial work, *Humane policy, or, Justice to the Aborigines of New Settlements, Essential to a Due Expenditure of British Money and to the Best Interests of the Settlers: With Suggestions how to Civilise the Natives by an Improved Administration of Existing Means* (London, Underwood, 1830).

¹¹³ Bannister to Wilmot Horton, 29 May 1823, CO 323/118, f. 45, AJCP reel PRO 934.

¹¹⁴ Bannister to Wilmot Horton, 1 April 1823, CO 323/118, f. 37a, AJCP reel PRO 934.

unknown to the Judges in the court in which I profess to practise'.¹¹⁵ Ker evidently interpreted Bannister's interest in colonial appointment in terms of his restricted professional prospects at home, and lamented that his former pupil had 'not hitherto had many opportunities' for distinguishing himself in court: 'Indeed', Ker declared, 'if you had, you could have little inducement to expatriate yourself for so small a reward'.¹¹⁶ Coinciding with Laidlaw's finding that repeated application improved a candidate's chances of success, Bannister's numerous submissions were rewarded with appointment as Attorney-General of New South Wales.¹¹⁷

Tory MP and Lord Lieutenant of Pembrokeshire, Sir John Owen, proposed his legal adviser, J.T. Gellibrand, for the corresponding office in Van Diemen's Land.¹¹⁸ Gellibrand appears to have submitted no written application; instead, Owen addressed Wilmot Horton on his behalf, expressing himself 'anxious for Mr Gellibrand's success'.¹¹⁹ Peter Howell argues that Owen's patronage was less significant than Commissioner Bigge's recommendation that a solicitor like Gellibrand 'would do'.¹²⁰ Recognising the professional and social distinctions between barristers and other lawyers, Owen suspected that the 'business likely to be [in Van Diemen's Land] at present would not induce other barristers to go there, and ... the Attorney General if a barrister would not like to plead in a court where he had only Solicitors to

¹¹⁵ Bannister to Wilmot Horton, 29 May 1823, CO 323/118, f. 45, AJCP reel PRO 934. Some junior barristers did not make regular court appearances, but worked in chambers as equity draughtsmen and conveyancers. Duman, *The English and Colonial Bars*, p. 8.

¹¹⁶ Ker to Bannister, [n.d.] May 1823, CO 323/118, ff. 49-50, AJCP reel PRO 934. Bannister's salary of £1,200 a year as attorney-general was equal to that of the Chief Justice of Van Diemen's Land, and included the right to private practice as a barrister.

¹¹⁷ Laidlaw, *Colonial Connections*, p. 105.

¹¹⁸ Owen was the elder brother of controversial Van Diemen's Land colonist, Edward Lord. T. Rienits, 'Lord, Edward (1781-1859)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/lord-edward-2370/text3113>> accessed 1 August 2011; Robson, *A History of Tasmania*, p. 139; Howell, 'Shovelling out distressed gentlefolk?', p. 74.

¹¹⁹ Owen to Wilmot Horton, [received 20 June 1823], CO 323/118, f. 440, AJCP reel PRO 934.

¹²⁰ Howell, 'Shovelling out distressed gentlefolk?', p. 76. The phrase is Owen's reading of Bigge's advice. Owen to Wilmot Horton, [received 20 June 1823], CO 323/118, ff. 439-439a, AJCP reel PRO 934.

oppose him'.¹²¹

Gellibrand had been in legal practice since 1816, and sought to emigrate with his father, wife and children.¹²² Later reports from the Colonial Office indicate that appointment to Van Diemen's Land enabled him to evade his creditors in circumstances 'which, if true', Wilmot Horton later wrote to Governor Arthur, 'would seriously involve the respectability of Mr Gellibrand's character and render him a very unfit person for the important situation' of attorney-general.¹²³ Gellibrand was appointed attorney-general in August, and proceeded to Van Diemen's Land with his extended family in November.¹²⁴ Travelling companions aboard the *Hibernia* included John Pedder and Saxe Bannister.¹²⁵

1.3 Connections and patronage: appointment to the colonial judiciary

Laidlaw's analysis of patronage in the British imperial world highlights the 'affective, nuanced networks of personal connection' which underpinned Colonial Office recruitment culture before James Stephen's 'bureaucratic revolution' of 1836.¹²⁶ Networks of this kind facilitated Pedder's rise to the bench. This section proposes that his political and professional connections provided both the catalyst for application and the means of securing office, as Pedder's patrons utilised more senior connections of their own to bring their

¹²¹ Owen to Wilmot Horton, [received 20 June 1823], CO 323/118, f. 439, AJCP reel PRO 934; Howell, 'Shovelling out distressed gentlefolk?', p. 76. Howell underestimates the social and professional division between the junior and senior branches of the law.

¹²² P.C. James, 'Gellibrand, Joseph Tice (1792?-1837)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/gellibrand-joseph-tice-2088/text2621>> accessed 10 August 2011; Robson, *A History of Tasmania*, p. 111.

¹²³ Wilmot Horton to Arthur, 22 February 1825, *HRA* III, IV, p. 241; Bennett, *Sir John Pedder*, p. 29.

¹²⁴ Warrant for Commission of Attorney-General Gellibrand, 1 August 1823, *HRA* III, IV, p. 475.

¹²⁵ *Hobart Town Gazette*, 19 March 1824, p. 2.

¹²⁶ Laidlaw, *Colonial Connections*, pp. 4, 65-66, 103-106; J.M. Bourne, *Patronage and Society in Nineteenth-Century England* (London, E. Arnold, 1986), pp. 79-80; P. Harling, 'Rethinking "Old Corruption"', *Past and Present* 147 (1) (1995), p. 129. Stephen had acted as counsel to the Colonial Office from 1813, and was permanent undersecretary from 1836. A.G.L. Shaw, 'Stephen, Sir James (1789-1859)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Jan 2008 <<http://www.oxforddnb.com/view/article/26374>> accessed 23 September 2009.

protégé to the attention of high-ranking officials within the ministry.

It seems doubtful that Pedder should have 'boldly decided to become a candidate' for judicial office in Van Diemen's Land, as Bennett suggests.¹²⁷ Just as his friend Bannister had 'been advised' to apply to the Colonial Office, Pedder was probably encouraged to put his name forward by his professional and political connections.¹²⁸ Bannister had links to the powerful Macarthur family of New South Wales through John Macarthur junior, then active as a barrister and family lobbyist in London. Through his longstanding friendship with Wilmot Horton, Macarthur successfully influenced Bannister's appointment as Attorney-General of New South Wales.¹²⁹ N.D. McLachlan has characterised Macarthur's association with Wilmot Horton as a 'model of private lobbying'.¹³⁰ In a 'mutually beneficial arrangement', Macarthur helped his 'old school-friend' to secure appointments, company shares, specimens of colonial fauna, and financial support for his election to the House of Commons; Wilmot Horton reciprocated by providing assistance with land grants and the passage of legislation to benefit the Macarthur family's interests.¹³¹

A fellow Cambridge graduate, Macarthur's social, political and professional associations would also have made him a natural ally for Pedder. That the two men had conferred on the proposed operation of the law in Van Diemen's Land before Pedder's formal appointment to the colony is revealed in a letter to Governor Arthur of 1825. In the context of determining the applicability of particular imperial statutes in the colony, Pedder's advice was guided by his recollection that 'At the time the [*New South Wales*] Act was drawing ...

¹²⁷ Bennett, *Sir John Pedder*, p. 8.

¹²⁸ Bannister to Wilmot Horton, [?] March 1823, CO 323/118, f. 29, AJCP reel PRO 934.

¹²⁹ John Macarthur to John Macarthur junior, 24 January 1824, Macarthur Papers, Mitchell Library (hereafter ML) A2899, pp. 81-2, cited in M.H. Ellis, *John Macarthur* (Sydney, Angus and Robertson, 1973), pp. 481, 497; Laidlaw, *Colonial Connections*, p. 132; and King, *Colonial Expatriates*, p. 27. According to Ellis, Bannister 'owed his office' to Macarthur.

¹³⁰ N.D. McLachlan, 'Bathurst at the Colonial Office, 1812-27: A reconnaissance', *Historical Studies* 13 (52) (1969), p. 499.

¹³¹ McLachlan, 'Bathurst at the Colonial Office', pp. 499-500; Ellis, *John Macarthur*, p. 481.

I remember to have had more than one conversation with Mr Forbes and Mr John McArthur [*sic*]’ on Commissioner Bigge’s *Report on the Judicial Establishments*.¹³² While there is no direct evidence that Macarthur played a role in Pedder’s appointment, their mutual association with Bannister illustrates that Pedder’s personal networks connected him to individuals with considerable influence at the Colonial Office.

Pedder’s application for the judgeship in Van Diemen’s Land was initiated by three patrons, who approached Wilmot Horton on his behalf. In an era of small-scale, amateur administration, the most useful patrons were senior political staff at the Colonial Office or within the broader ministry.¹³³ Significantly, Pedder’s benefactors were closely connected to the government: William Holmes, Tory whip and ‘dispenser of patronage’;¹³⁴ Francis Bonham, lawyer and Tory political agent;¹³⁵ and George Bankes, Fellow of Trinity Hall, Cambridge, and member of a Tory parliamentary dynasty.¹³⁶ In addition to their government connections and common political affinity, Pedder’s patrons were linked to his own educational and professional networks through the Inns of Court and Cambridge.

Bennett conjectures that the aspiring judge chose ‘men known to him’ in the

¹³² Pedder to Arthur, 9 April 1825, Papers of Sir George Arthur (hereafter Arthur Papers), vol. 9, ML ZA 2170, reel MAV/FM4/ 3671. The *New South Wales Act* was passed in the imperial parliament on 19 July 1823.

¹³³ Laidlaw, *Colonial Connections*, pp. 103-4, 167.

¹³⁴ For thirty years a Tory whip, ‘Black Billy’ Holmes also supported other colonial applicants. J.A. Hamilton, ‘Holmes, William (1779-1851)’, rev. H.C.G. Matthew, *Oxford Dictionary of National Biography*, Oxford University Press, 2004

<<http://www.oxforddnb.com/view/article/13605>> accessed 31 August 2007. For other references provided by Holmes, see CO 323/117, ff. 119, 121, 123-123a, AJCP reel PRO 934.

¹³⁵ Bonham was called to the bar at Lincoln’s Inn in 1814 but never practised as a barrister. N. Gash, ‘Bonham, Francis Robert (1785–1863)’, rev., *Oxford Dictionary of National Biography*, Oxford University Press, 2004

<<http://www.oxforddnb.com/view/article/37207>> accessed 31 August 2007.

¹³⁶ Bankes was a Fellow of Trinity Hall, Cambridge, 1814-1822. Admitted to Lincoln’s Inn and the Inner Temple, he was called to the bar in 1815 and sat in the House of Commons with his father, Henry, and brother, William. G.V. Benson, ‘Bankes, George (1787–1856)’, revised by H.C.G. Matthew, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 <<http://www.oxforddnb.com/view/article/1286>> accessed 31 August 2007.

absence of 'eminent acquaintances' of his father.¹³⁷ This interpretation ignores the lower socio-professional status and commercial focus of Pedder's attorney father, and significantly underestimates the value of the young barrister's own connections. As Laidlaw's reassessment of imperial governance demonstrates, individuals cultivated links to the Colonial Office via personal networks. Some, like the powerful Peninsular network, were directly and deliberately formed and maintained, while others were based 'more obliquely on a recognition of shared politics, professional camaraderie, or the obligations of friendship or family'.¹³⁸ McLachlan points out that the 'ultra-Tory' Earl Bathurst, Secretary of State for the Colonies at the time of Pedder's appointment, was 'zealous' in dispensing imperial patronage, and 'enjoyed ... distributing colonial appointments among relations and friends and their relations and friends'.¹³⁹ Pedder's tangential connection to Wilmot Horton via Bannister and Macarthur and the three Tories, Holmes, Bonham and Bankes, is therefore not without significance. In the context identified by Laidlaw and McLachlan, eminent acquaintances were only part of the equation: for a sub-gubernatorial appointment to a relatively minor colony, it was, in fact, more useful to have numerous intermediary patrons within the Colonial Office sphere.¹⁴⁰

Pedder's political patrons played a key role in initiating the recruitment process, but the connections of his professional referees were also important. Testimonials from his former pupil-master, Henry Bellenden Ker, illustrate how applicants without direct links to high-ranking officials could take advantage of intersecting networks by enlisting the support of intermediaries. Ker's correspondence reveals his own estimation of his value as a sponsor. Writing 'in haste' from the Court of Chancery in his first

¹³⁷ Bennett, *Sir John Pedder*, p. 8. Howell similarly underestimates the value and status of Pedder's political patrons. Howell, 'Shovelling out distressed gentlefolk?', p. 76.

¹³⁸ Laidlaw, *Colonial Connections*, pp. 14, 21. Headed by the Duke of Wellington, veterans of the Peninsular Wars formed one of the most powerful and extensive networks.

¹³⁹ McLachlan, 'Bathurst at the Colonial Office', pp. 494, 498, 500.

¹⁴⁰ Laidlaw, *Colonial Connections*, pp. 103-4. On the broader culture of personal communication within the administration, see p. 167.

‘testimonial’, Ker supposed that Pedder would ‘no doubt’ be able to procure testimony on his professional attainments ‘from higher sources’.¹⁴¹

Ker’s sense of his place in the professional hierarchy is even more evident in his correspondence with Saxe Bannister. Conceding that he did not belong to ‘that rank in the profession’ which would lend ‘any weight’ to his opinion of Bannister’s suitability as a candidate, Ker was nonetheless conscious that this deficiency could be overcome through the intervention of his own contacts.¹⁴² Acknowledging, for instance, that his recommendation would carry ‘little weight with Lord Bathurst, to whom I am entirely unknown’, he referred the Secretary of State to the Vice Chancellor, with whom he had been ‘long and intimately’ associated.¹⁴³ Ker was confident that a ‘satisfactory answer’ from the Vice Chancellor would encourage ‘his lordship to place much more reliance on any testimony coming from me than he otherwise would be induced to do’.¹⁴⁴

In addition to his written testimonial for Pedder, Ker offered to ‘wait on the attorney general’ or mention his former pupil’s wishes to Mr Hobhouse, Undersecretary of the Home Department.¹⁴⁵ Both the attorney-general, Sir Robert Gifford, and Henry Hobhouse were connected with the Middle Temple.¹⁴⁶ Their support provides further illustration of the integration of professional networks within the culture of personal recommendation. A note in the Colonial Office files confirms that the attorney general gave Pedder ‘the very highest character not from his own knowledge but from a variety of reports which have been made to him of his merits’.¹⁴⁷ Pedder’s

¹⁴¹ Ker to Pedder, 6 March 1823, CO 323/118, f. 454, AJCP reel PRO 934.

¹⁴² Ker to Bannister, 23 May 1823, CO 323/118, ff. 58-58a, AJCP reel PRO 934.

¹⁴³ Ker to Bannister, [n.d.] May 1823, CO 323/118, f. 49, AJCP reel PRO 934.

¹⁴⁴ Ker to Bannister, [n.d.] May 1823, CO 323/118, f. 49, AJCP reel PRO 934.

¹⁴⁵ Ker to Pedder, 6 March 1823, CO 323/118, f. 454, AJCP reel PRO 934.

¹⁴⁶ J.M. Rigg, ‘Gifford, Robert, first Baron Gifford (1779-1826)’, rev. Hugh Mooney, *Oxford Dictionary of National Biography*, Oxford University Press, 2004, <<http://www.oxforddnb.com/view/article/10667>> and G.C. Boase, ‘Hobhouse, Henry (1776-1854)’, rev. G. H. Martin, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 <<http://www.oxforddnb.com/view/article/13403>> accessed 31 August 2007.

¹⁴⁷ Penn to Wilmot Horton, 10 March 1823, CO 323/118, f. 444, AJCP reel PRO 934. Original

personal links to intermediaries who, in turn, had access to more senior officials across the Tory ministry, ensured that he became 'an object of interest to a great number of persons'.¹⁴⁸ In August 1823, a warrant was issued to prepare the Charter of Justice of the Supreme Court of Van Diemen's Land, and, on 13 October, the 30-year-old lawyer was appointed 'first Chief Justice' of the colony, 'the said John Lewes Pedder being a barrister in England'.¹⁴⁹

In contrast to Bennett's dismissal of the recruitment process as 'eccentric', Howell's analysis of Colonial Office 'patronage books' from the 1820s suggests that contemporary appointments to Van Diemen's Land generally 'reflected a desire to select officials who were competent and honourable'.¹⁵⁰ Where personal recommendation was insufficient, he finds, experts were also consulted, particularly in the case of legal or medical appointments.¹⁵¹ Resonating with Laidlaw's findings, Howell also calls attention to socio-economic pressures in Britain in an age of government retrenchment, officer redundancy and wider access to tertiary education. Being 'unable to make a decent living' in Britain, he concludes, was 'by no means a true reflection of [an applicant's] capacity'.¹⁵²

Asserting that Van Diemen's Land was 'very fortunate to get' a judge of Pedder's 'calibre', Howell attributes his success to merit.¹⁵³ In contrast to the aristocratic patronage of his 'rivals', he argues, Pedder's appointment 'rested on the support' of referees who testified to his 'very extensive knowledge of

emphasis. Howell notes that the 'views of the Attorney-General or a judge of the courts of Westminster were given due notice in the case of legal appointments'. Howell, 'Shovelling out distressed gentlefolk?', p. 73.

¹⁴⁸ Penn to Wilmot Horton, 10 March 1823, CO 323/118, f. 444, AJCP reel PRO 934.

¹⁴⁹ Warrant for the Charter of the Supreme Court of Van Diemen's Land, *HRA* III, IV, pp. 478-490.

¹⁵⁰ Bennett, *Sir John Pedder*, p. 9; Howell, 'Shovelling out distressed gentlefolk?', pp. 68, 73, 75.

¹⁵¹ Howell, 'Shovelling out distressed gentlefolk?', pp. 73-74.

¹⁵² Howell, 'Shovelling out distressed gentlefolk?', p. 75; Laidlaw, *Colonial Connections*, p. 102.

¹⁵³ Howell, 'Shovelling out distressed gentlefolk?', p. 76.

the law' and 'habits of great assiduity and attention'.¹⁵⁴ Howell's generous assessment of Pedder's professional ability does not correspond with its weight as a selection criterion. Rival candidates for the post in Van Diemen's Land are known through internal Colonial Office correspondence which refers chiefly to their patrons. While two were probably lawyers, one of those considered was an army officer; a fifth candidate was a barrister with circuit experience, but his application post-dated Pedder's appointment.¹⁵⁵ Resonating with Attorney-General Giffard's emphasis on Pedder's character, the list of other candidates suggests that legal experience was not the key criterion for appointment.

Duman's empire-wide analysis of nineteenth-century judicial appointments indicates that the only prerequisite for English and colonial judges was that they be qualified to practise as barristers.¹⁵⁶ Admission to the bar constituted the only qualification to practise during this period, but a call to the bar did not lead directly to an active career in the law. Corresponding with Duman's findings, Tony Earls' doctoral prosopography of the nineteenth-century Australian bench and bar illustrates that early Colonial Office nominees shared key characteristics of relative youth and limited legal practice.¹⁵⁷ A striking example is that of Barron Field, appointed to the old Supreme Court of New South Wales in 1816. Called to the bar only two years before his appointment to the colonial judiciary, Field was working at *The Times* as a 'dramatic critic' when he was posted to Sydney.¹⁵⁸ Among the range of variables examined in his study, Earls calculates that, for colonial judges, the

¹⁵⁴ Howell, 'Shovelling out distressed gentlefolk?', p. 76, quoting Newland to Pedder, 6 March 1823, CO 323/118, f. 450, AJCP reel PRO 934.

¹⁵⁵ Other candidates included Mr Bowles, 'Sir J.D. Astley's friend' and Colonel Rochfort. Wilmot Horton to Penn, undated marginal note, CO 323/118, f. 444a, AJCP reel PRO 934; Edward Holroyd to Wilmot Horton, 27 October 1823, CO 323/118, f. 308, AJCP reel PRO 934.

¹⁵⁶ Duman, *The English and Colonial Bars*, p. 125.

¹⁵⁷ T. Earls, 'Three waves of Australian judges', Australia New Zealand Law and History Society Conference, University of Adelaide, 2008; personal communication, 20 January 2009.

¹⁵⁸ M.H. Ellis, *Lachlan Macquarie: His Life, Adventures and Times* (Sydney, Angus and Robertson, 1973), p. 425; C.H. Currey, 'Field, Barron (1786-1846)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/field-barron-2041/text2523>> accessed 1 August 2011.

average age at appointment was 42; most appointees had less than twelve years' experience at the bar.¹⁵⁹ Aged 30 and with three years at the Chancery bar, Pedder clearly sits at the lower end of the spectrum in terms of both age and professional experience. Nonetheless, his elevation to the bench is broadly consistent with contemporary Colonial Office practice in the Australian colonies.

Disregarding this broader historical context, Bennett compares Pedder's appointment unfavourably – and largely anachronously – with those of foundation chief justices in other Australian colonies.¹⁶⁰ Bennett's critical comparison of Pedder with Francis Forbes, appointed contemporaneously to the Chief Justiceship of New South Wales, is particularly subjective.¹⁶¹ Identifying himself as 'a West Indian', Francis Forbes (1784–1841) was born in the Caribbean, and had practised as a barrister in Bermuda before his appointment as that colony's attorney general in 1810.¹⁶² In 1816, he accepted the post of Chief Justice of Newfoundland; however, clashes with the governor and the island's harsh climate undermined his health and, in 1822, he took leave of absence to convalesce in England.¹⁶³ In London between September 1822 and August 1823, Forbes cultivated associations with Wilmot Horton and his 'great benefactor' at the Colonial Office, Lord Bathurst.¹⁶⁴ He also collaborated with Colonial Office counsel, James

¹⁵⁹ Earls, 'Three waves of Australian judges'.

¹⁶⁰ Bennett, *Sir John Pedder*, pp. 9–10.

¹⁶¹ As Bruce Kercher observes, Bennett 'obviously admires' Forbes. B. Kercher, 'Book Reviews. *Lives of the Australian Chief Justices: Sir Francis Forbes: First Chief Justice of New South Wales 1824–1837; Sir James Dowling: Second Chief Justice of New South Wales 1837–1844*, and *Sir William A'Beckett: First Chief Justice of Victoria 1852–1857*, John Bennett', *Australian Journal of Legal History* 7 (2) (2003), p. 289.

¹⁶² Forbes to Wilmot Horton, 6 February 1825, Catton Papers: Papers of Sir R.J. Wilmot Horton, Under Secretary of State for War and the Colonies, 1821–1828, [n.p.], AJCP reel M791; J.M. Bennett, 'Forbes, Sir Francis (1784–1841)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; <<http://www.oxforddnb.com/view/article/9825>> accessed 14 January 2008.

¹⁶³ Bennett, 'Forbes, Sir Francis (1784–1841)', *Oxford Dictionary of National Biography*.

¹⁶⁴ Bennett, 'Forbes, Sir Francis (1784–1841)', *Oxford Dictionary of National Biography*.

¹⁶⁴ Forbes to Horace Twiss, 30 November 1829, HRA I, XV, pp. 458–459; J.M. Bennett, *Lives of the Australian Chief Justices. Sir Francis Forbes: First Chief Justice of New South Wales, 1823–1837* (Sydney, The Federation Press, 2001), pp. 44, 48.

Stephen, on the preparation of the New South Wales Bill.¹⁶⁵ In August 1823, Wilmot Horton advised that if the present state of Forbes' health prevented his 'speedy return to Newfoundland', Lord Bathurst would 'feel great pleasure in recommending' his appointment to the vacant office of Chief Justice of New South Wales.¹⁶⁶ Forbes accepted the post and sailed for Port Jackson with his family later that month.¹⁶⁷

Forbes clearly stands out as the exception among the appointees of 1823. Handpicked by the Secretary of State, he possessed previous colonial and judicial experience, and had played a key role in drafting the legislation under which the new colonial courts would operate. Forbes' own opinion about colonial judicial appointments is detailed in a letter to Wilmot Horton dated 3 February 1823. Commenting on a Colonial Office 'paper' on the 'selection of judges for the colonial courts', Forbes agreed that 'great caution' should be exercised.¹⁶⁸ In choosing appointees, he favoured a combination of merit and personal recommendation, and placed particular emphasis on a candidate's worthiness: '*dignissimo detur [sic]*',¹⁶⁹ he wrote, 'is a pretty general rule of preferment to places of trust, and if there be one to which it might be applied with more than ordinary exactness, it should be in the appointment of a judge'.¹⁷⁰

In light of Bennett's critique of Pedder's limited professional experience, Forbes' opinion is significant. As an experienced colonial judge, he did not believe that 'having practised in some court at home should be a necessary

¹⁶⁵ Bennett, *Sir Francis Forbes*, pp. 49, 52.

¹⁶⁶ Wilmot Horton to Forbes, 13 August 1822, Forbes Papers, ML A1381, f. 52, cited in Bennett, *Sir Francis Forbes*, p. 45.

¹⁶⁷ Bennett, *Sir Francis Forbes*, p. 55.

¹⁶⁸ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791; J.M. Bennett (ed.), *Some Papers of Sir Francis Forbes: The First Chief Justice in Australia* (Sydney, Parliament of New South Wales, 1998), p. 17.

¹⁶⁹ More usually *detur dignissimo*, 'Let it be given to the most worthy'. D.E. MacDonnel, *A Dictionary of Select and Popular Quotations, which are in Daily Use; Taken from the Latin, French, Greek, Spanish, and Italian Languages, With Illustrations Historical and Idiomatic, Translated into English by D.E. MacDonnel, of the Middle Temple. Third American Edition, Corrected, with Additions* (Philadelphia, A. Finley, 1818), p. 65.

¹⁷⁰ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

qualification' for appointment to the colonial judiciary.¹⁷¹ Writing a month before Pedder's application was submitted to Wilmot Horton, Forbes told the undersecretary that he did 'not know of any course of practice in England, which will qualify a practitioner immediately for the bench in the ... colonies'.¹⁷² In contrast to the multi-jurisdictional courts proposed for New South Wales and Van Diemen's Land, each branch of English law had its 'separate court, judges and practitioners'.¹⁷³ The tribunals and proceedings of the common, civil, ecclesiastical and admiralty law practised in England, Forbes explained, 'differ as widely from each other as the Courts of Athens from the Courts of Rome'.¹⁷⁴ As a result, he believed, it would be impossible for 'anyone [to] acquire by practice in England, that comprehensive acquaintance with the whole body of English law, and facility in the application which are necessary to the colonial lawyer, and indispensable to the colonial judge'.¹⁷⁵

Forbes himself had not practised in England or studied law at university. Having trained under the Chief Justice of Bermuda and then at Lincoln's Inn between 1806 and 1809, he had been 'specially admitted to practise in Bermuda' before his call to the bar in London in 1812.¹⁷⁶ Indeed, as Forbes acknowledged to Wilmot Horton, he was 'exclusively indebted' to the 'provincial Bars ... for all the useful knowledge of colonial law and practice' that he possessed.¹⁷⁷ He could not conceive that any lawyer practising in one of the discrete jurisdictions of the 'immense metropolis' could obtain the varied knowledge and experience necessary for the colonial bench or bar.¹⁷⁸ Following Forbes' logic, the narrower focus of metropolitan legal training and practice meant that any London barrister would struggle to adapt to the omnicompetent colonial courts. Pedder was not exceptional in this respect.

¹⁷¹ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

¹⁷² Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

¹⁷³ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

¹⁷⁴ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

¹⁷⁵ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

¹⁷⁶ Bennett, 'Forbes, Sir Francis (1784–1841)', *Oxford Dictionary of National Biography*.

¹⁷⁷ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

¹⁷⁸ Forbes to Wilmot Horton, 3 February 1823, Catton Papers, [n.p.], AJCP reel M791.

Combined with Forbes' emphasis on a candidate's character, his elucidation of the structural context helps to underscore why – as with so many other Colonial Office appointments – professional experience ultimately carried less weight than personal, social and political considerations in determining Pedder's capacity for office.

Conclusions

The eldest son of a commercial family in the City of London, John Lewes Pedder allied himself to the conservative metropolitan establishment through education and the law. With his status as a gentleman linked to his standing as a barrister, Pedder joined many financially insecure professionals of his generation in seeking colonial appointment during a period of economic dislocation at home. Family circumstances suggest possible reasons for the timing of his expatriation, but the publication of Commissioner Bigge's *Report on the Judicial Establishments* in February 1823 appears to have provided the catalyst for Pedder's application for the judgeship in Van Diemen's Land.

Microhistorical analysis and comparison of a selection of contemporaneous applications for colonial appointment illuminate the mechanics of Colonial Office selection procedures in an age of recruitment by personal recommendation. By tracing the patrons and referees identified in Colonial Office correspondence files, this chapter maps Pedder's intersecting friendship, professional and political networks to reveal that he was linked, via intermediaries, to senior political officials within the Tory ministry. While academic and professional referees played an important role in the recruitment process, judicial appointment was secured through the intervention of senior political figures who, while personally unknown to Pedder, wielded crucial influence at the Colonial Office on his behalf.

Combining this thick description with the pan-imperial context fleshed out by recent comparative studies, this chapter demonstrates that Pedder's posting

to Van Diemen's Land was broadly consistent with Colonial Office recruitment practices during the early 1820s. An establishment-minded gentleman, he was a politically and socially acceptable appointee. Qualified to practise as a barrister in England, he also fulfilled the only professional requirement for appointment to the judiciary. Of more practical importance, perhaps, the Chief Justiceship of Van Diemen's Land was a minor posting in a remote colony. Official parsimony and the demanding conditions of a relatively new penal colony increased the difficulty of attracting applicants for a post with a comparatively low salary and status. In comparison to the fiercely competitive London bar, however, appointment to the colonial judiciary offered the young Pedder greater financial security and enhanced professional status.

CHAPTER 2

FAMILY MAN: HUSBAND, BROTHER, UNCLE

Pedder's affection for family is palpable in his limited extant personal correspondence, and has a strong claim to be included in any assessment of his life. Very little, however, is recorded in published sources. Hints of his genealogy are revealed in the names and occupations of paternal ancestors,¹ but the intimate sphere of the family remains a blank. The patriarchal focus of traditional genealogy and the deferential conventions of judicial biography favour the collection of an 'ever-swelling list of achievements, offices, honours, and distinctions',² which highlights masculine trajectories of success in the public sphere, but sidelines domestic experiences. Where a wife is mentioned, it is often only as the daughter of another man of high standing. By contrast, and corresponding with the recent democratisation of family history, academic history of the family frames the family as a 'major institution of daily life' which illuminates not only the life and character of the individual, but also the broader values of the society in which s/he lived.³ This chapter argues that recovering Pedder's roles within his close-knit family offers new and useful perspectives on a man previously characterised through the limiting frame of his official persona.

In the absence of direct descendants or published accounts of his family history, Chief Justice Pedder was appropriated as a respectable colonial

¹ In this paradigm, Pedder's identity derives from the occupational status of his father and grandfather: he is the '1st s[on] of John Pedder of the Middle Temple', who, in turn, is the son of another John Pedder, a 'merchant in the City of London'. R.L. Arrowsmith, *Charterhouse Register, 1769-1872, With Appendix of Non-Foundations, 1614-1769* (London, Phillimore, 1974), p. 289; H.A.C. Sturgess (ed.), *Register of Admissions to the Honourable Society of the Middle Temple, Vol. II* (London, Butterworth for the Honourable Society of the Middle Temple, 1949), p. 400.

² I. Donaldson, 'Matters of life and death: The return of biography', La Trobe University Annual Lecture, *Australian Book Review* 286 (2006), p. 27.

³ R.J.W. Selleck, 'Family history and the history of families', *Education Research and Perspectives* 31 (2) (2004), p. 50; J. Turner Censer, 'What ever happened to family history? A review article', *Comparative Studies in Society and History* 33 (3) (1991), p. 538.

kinsman in the twentieth century by a Tasmanian family of convict descent.⁴ Hobart solicitor Alfred Pedder (1881-1977) erroneously claimed – or believed himself – to be the ‘great grand-nephew’ of the chief justice.⁵ Alfred Pedder’s claim appeared to be strengthened by his membership of the Hobart legal fraternity, and by his possession of items which had apparently belonged to the judge. The Pedder artefacts, including a wooden box engraved with the judge’s name, a silver snuff-box and a ‘law book with his hand signature inside’, provide no firm proof of a family connection, however, for Sir John Pedder auctioned many household and personal items before his return to England in 1856.⁶ Archives Office correspondence and a supplement to the *Australian Dictionary of Biography* confirm that there is ‘no relationship’ between the two families.⁷ That the appeal of such specious family histories endures is evidenced, however, by the willingness of later generations to retell them. Pedder’s judicial biographer, for instance, appears to have accepted at face value the claim of Alfred Pedder’s daughter, Sylvia, to be the ‘last surviving Australian collateral descendant [*sic*] of Sir John Pedder’, during an unsuccessful search for ‘family papers’ in the 1970s.⁸

In this context, accurately mapping John Lewes Pedder’s familial connections

⁴ This family was descended from Joseph Pedder, transported per *Southworth* in 1830. As an emancipist, Joseph prospered and his son, Frederick Pedder (1841-1923), became a solicitor and Superintendent of Police. Conduct record, Joseph Pedder, AOT CON31/1/35, f. 28; AOT General People Index: Pedder, Frederick.

⁵ J.S. Legge (ed.), *Who’s Who in Australia 1968* (Melbourne, The Herald and Weekly Times, 1968), p. 681. The claim (modified to ‘great nephew’) is repeated in J.N.D. Harrison (ed.), *Court in the Colony: Hobart Town, May, 1824* (Hobart, Law Society of Tasmania, 1974), p. 20.

⁶ AOT Correspondence File, Chief Justice Pedder, undated note [c. 1950?] from Alfred Pedder which lists ‘articles in my possession’; *Courier*, 3 March 1855, p. 3; 30 January 1856, p. 1.

⁷ AOT Correspondence File, Joseph Pedder, Query No. 68/89; H. Gibbney and A.G. Smith, *A Biographical Register, 1788-1839. Notes from the Name Index of the Australian Dictionary of Biography* (Canberra, Australian Dictionary of Biography, 1987), p. 170.

⁸ J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press 2003), p. x. Sylvia Pedder’s brother had several children, so her claim to be last member of the judge’s family is doubly inaccurate. Strictly speaking, collateral kindred descend from a common ancestor, such as a grandparent; they cannot descend from a collateral relative. Will of Sylvia Rebecca Sherbourne Pedder, 1988, AOT AD960/1/203, Will No. 80556; H. Chitty, *A Treatise on the Laws of Descent, By Henry Chitty of the Middle Temple, Esq., Conveyancer* (London, Joseph Butterworth and Son, 1825), pp. 88-89.

becomes a fundamental aspect of reconstructing his life. Pedder and many of his close relatives were born before the advent of civil registration in England and Van Diemen's Land.⁹ Other genealogical records, such as wills, parish registers and newspaper announcements are therefore vital for identifying family links and events. The pedigree chart below delineates four generations of Pedder's family, from his maternal and paternal grandparents to his brother's children. This visual representation clearly shows that John Lewes Pedder and his wife, Maria Everitt, were maternal first cousins who left no descendants.

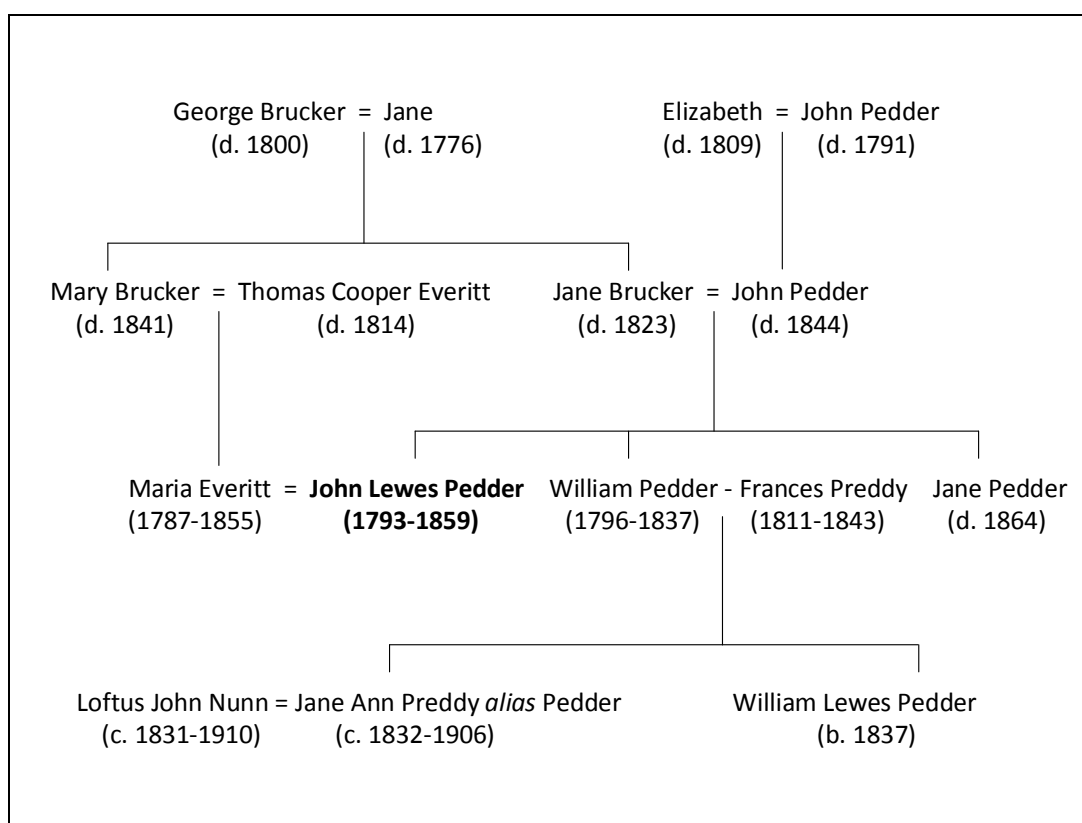


Figure 3: Pedigree chart of John Lewes Pedder.¹⁰

Focussing on key individuals identified in the pedigree chart, this chapter explores Pedder's close family relationships through narratives which reveal gender- and status-based articulations of respectability in a nascent settler

⁹ Civil registration was introduced in England and Wales in 1837 and in Van Diemen's Land the following year, with the passage of 2 Vic. No. 8, *An Act for Registering Births, Deaths and Marriages in the Island of Van Diemen's Land and Its Dependencies* (1838).

¹⁰ I have compiled this pedigree chart from genealogical sources listed in the Bibliography.

community on the periphery of the Anglophone world. At section 2.1, Pedder's relationship with Maria Everitt is explored in some detail. From their marriage in 1823 until her death in 1855, Maria played a central role in Pedder's life. In common with other official spouses, however, she has received scant scholarly attention. Piecing together evidence from archival and literary sources, this section demonstrates that Pedder relied on his wife as a trusted adviser and confidante. At the same time, Lady Pedder's philanthropic and social activities complemented her husband's respectable reputation.

Section 2.2 reveals the presence of Pedder's extended family in the colony. Tracing the lives of Pedder's younger brother, Captain William Pedder, his partner, Frances Ann Preddy, and their two natural children, this section highlights Sir John's emotional and financial investment in the orphaned niece and nephew who joined his household in Hobart Town in 1843. It also reveals that family concerns played a key role in the timing of his repatriation to England in retirement.

2.1 John and Maria: a companionate marriage

John and Maria's consanguineous marriage is confirmed by the identification of their mothers as sisters, Jane and Mary Brucker.¹¹ Typical among English propertied classes until the end of the nineteenth century, Pedder's marriage to his cousin grounds his strong connection to family in shared values and social background in an age which valued broad kinship connections.¹² Maria has previously been identified only as the daughter of 'Lt Col Everett [*sic*]'.¹³ Genealogical investigation establishes his identity as Colonel Thomas Cooper

¹¹ Will of George Brucker, Esquire, of Clapham Common, Surrey, dated 8 March 1800, proved 5 May 1800, The National Archives (hereafter TNA) PROB 11/1341. Mary Brucker married Thomas Cooper Everitt, 15 September 1783; Jane Brucker married John Pedder, 13 March 1787. Both marriages were solemnised at St Nicholas Cole Abbey, Old Fish Street, London. Ancestry.com. London, England, Marriages and Banns, 1754-1921 [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2010, Guildhall, St Nicholas Cole Abbey, Register of Marriages, 1755-1812, P69/NIC2/A/01/Ms 5690/1.

¹² N.F. Anderson, 'Cousin marriage in Victorian England', *Journal of Family History* 11 (3) (1986), pp. 285-286, 291-296.

¹³ Arrowsmith, *Charterhouse Register*, p. 289; Bennett, *Sir John Pedder*, p. 9.

Everitt (d. 1814). Tracing his military appointments in the *London Gazette* confirms that Maria came from a family with solid links to the armed forces.¹⁴ Her brother, Henry Yarburgh Everitt (1791-1847), also served in the army,¹⁵ while her grandfather, Captain Michael Everitt (d. 1776), and uncle, Admiral Charles Holmes Everitt Calmady (d. 1807), were naval officers.¹⁶



Figure 4: Pedder's father-in-law/uncle, Colonel Thomas Cooper Everitt, 1800.¹⁷
Image reproduced courtesy of the National Army Museum, London

¹⁴ Everitt served in the 3rd Regiment of Dragoon Guards in the 1770s, and was Major-Commandant of the Hampshire Fencibles Light Dragoons in the 1790s. At the time of his death, he was on the Hospital Staff as Deputy Purveyor to the Forces. He was succeeded in this post by his son, Henry. *London Gazette*, 25 February 1772, p. 1; 20 May 1794, p. 476; 3 July 1813, p. 1312; and 31 May 1814, p. 1134; War Office, *A List of the Officers of the Army and of the Corps of Royal Marines, with an Index* (London, J. Hartnell, 1832), p. 386; Will of Thomas Cooper Everitt of Saint Marylebone, Middlesex, dated 12 June 1809, proved 14 April 1815, TNA PROB 11/1567.

¹⁵ Henry Yarburgh (or Yarborough) Everitt had also served as a deputy purveyor at Albany Hospital on the Isle of Wight. *London Gazette*, 15 November 1817, p. 2340; *Jackson's Oxford Journal*, 15 May 1847, p. 1.

¹⁶ Captain Everitt's commands are outlined in a 'Biographical Memoir of Arthur Phillip, Esq. Vice-Admiral of the Red Squadron', *The Naval Chronicles containing a General and Biographical History of the Royal Navy*, Institute of Naval History, <http://www.royal-navy.org/lib/index.php?title=Biographical_Memoir_of_Arthur_Phillip%2C_Esq.> accessed 17 August 2009. Charles Holmes Everitt took the name and arms of Calmady by royal licence on his marriage to the heiress, Pollexfen Calmady. *London Gazette*, 5 February 1788, p. 61.

¹⁷ 'Colonel Thomas Cooper Everitt, with the Hampshire Fencible Cavalry drawn up in the background, 1800'. Oil on canvas by equestrian painter, Thomas Gooch (1750-1802), National Army Museum, London.

The marriage of John Lewes Pedder, Esq., of the Middle Temple, to Miss Everitt, on 8 July 1823, was announced in the *European Magazine*.¹⁸ The site of publication of the marriage notice provides clues to Pedder's religious, social and political values, for, like the more popular *Gentleman's Magazine*, this 'nonpartisan' literary journal was 'unswervingly loyal to Church, King, and Constitution'.¹⁹ It also suggests Pedder's cultural interests, social pretensions, and the connections of the extended family. Emily de Montluzin identifies the magazine's readership as 'clergymen, landed gentry, magistrates, physicians, antiquaries, and lovers of literature',²⁰ a broader group than might be expected from Pedder's metropolitan legal and commercial connections.

The timing of the marriage is also significant. The process of Pedder's selection for the judgeship in Van Diemen's Land occupied the period from March to October 1823, when his appointment was formalised with the issue of Letters Patent.²¹ Tony Earls notes that some early colonial legal and judicial appointees married immediately before their departure from Britain,²² possibly due to the need for an acceptable consort and the perceived lack of suitable marriage partners in the colonies. A comparable marriage was that of New South Wales Solicitor-General, John Hubert Plunkett, who married his cousin, Maria Charlotte McDonougha, between the time of his colonial appointment and departure for Sydney in

¹⁸ *European Magazine, and London Review, Illustrative of the Literature, History, Biography, Politics, Arts, Manners, and Amusements of the Age, Embellished with Portraits. Volume 84, From July to December, 1823* (London, Sherwood Jones & Co, 1823), p. 91. John and Maria were married in the parish church of St Nicholas, Brighton, on 8 July 1823. 'England Marriages, 1538-1973', *FamilySearch*, <<https://www.familysearch.org>> accessed 24 April 2011. There is no evidence that the marriage was announced in any of the major London newspapers, such as *The Times*.

¹⁹ E.L. de Montluzin, 'Attributions of authorship in the *European Magazine*, 1782-1826', The Bibliographical Society of the University of Virginia, <<http://etext.lib.virginia.edu/bsuva/euromag/1EM.html#1>> accessed 18 August 2009.

²⁰ Montluzin, 'Attributions of authorship'.

²¹ *HRA III*, IV, p. 481.

²² T. Earls, 'Three waves of Australian judges', Australia New Zealand Law and History Society Conference, University of Adelaide, 2008; personal communication 20 January 2009.

1832.²³ Like Plunkett, Pedder married his cousin after his initial application to the Colonial Office and before his departure for Van Diemen's Land.

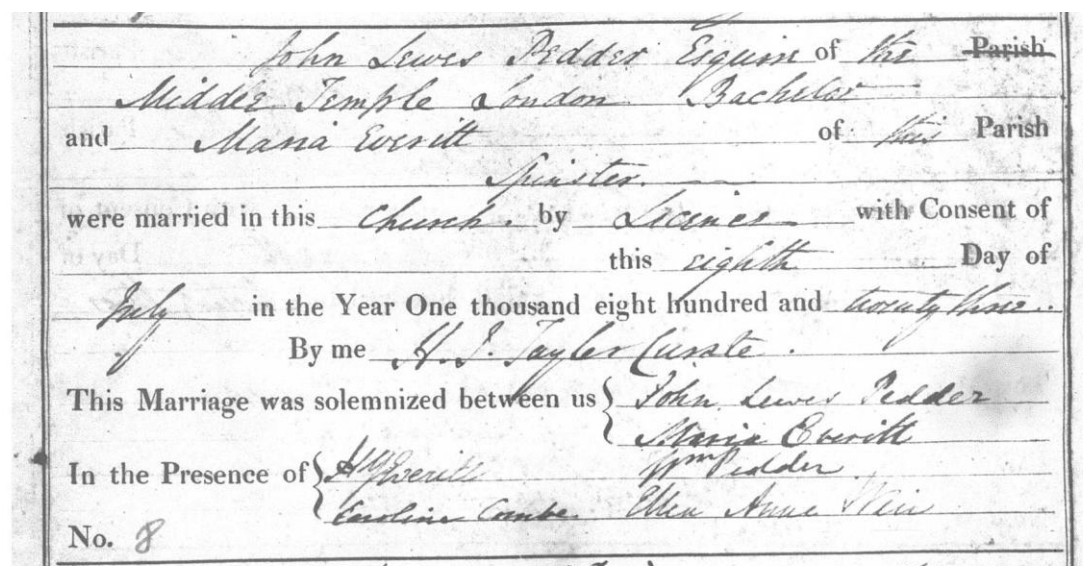


Figure 5: Record of the marriage of John Lewis Pedder and Maria Everitt, St Nicholas, Brighton, 8 July 1823.²⁴

It is possible that John and Maria entered into an endogamous marriage of convenience. Other evidence suggests, however, that the couple were already close, and Pedder's colonial appointment provided the financial security which formed a major determinant of age at marriage during the nineteenth century. R.S. Neale's 1972 prosopographical analysis of governors and executive councillors in the Australian colonies indicates that Pedder was fairly representative of this cohort, in terms of social status, level of education, and age at marriage.²⁵ Challenging the conventional Sancho Panza/Samuel Smiles binary of 'failed gentry' versus 'successful careerist',²⁶

²³ T. Earls, *Plunkett's Legacy: An Irishman's Contribution to the 'Rule of Law' in New South Wales* (Melbourne, Australian Scholarly Publishing, 2009), p. 52.

²⁴ East Sussex County Record Office, Brighton St Nicholas, Parish Registers, Marriages, PAR 255/1/3/4, 1823-26, Item 3, p. 3, no. 8. FHL British Film 1067115, Genealogical Society of Utah.

²⁵ R.S. Neale, *Class and Ideology in the Nineteenth Century* (London, Routledge & Kegan Paul, 1972), chapter 5, 'The colonies and social mobility: Governors and executive councillors in Australia, 1788-1856', pp. 97-120.

²⁶ Neale, *Class and Ideology in the Nineteenth Century*, p. 101. The 'failed gentry' appointee was assumed to have little more ambition than Sancho Panza, Don Quixote's fictional companion. Samuel Smiles (1812-1904) was the author of *Self-Help* (1859) and 'other works for those who wish to "improve" themselves by personal effort and initiative'. *OED*.

Neale points to the 'undeniably objective evidence' of age at marriage and number of children to argue that this group of expatriate colonial administrators was 'highly motivated' by 'rational, calculative and prudential considerations'.²⁷ While John and Maria had no children of their own, Pedder was typical of those administrators born between 1738 and 1803, whose first marriage occurred before 1829. Neale calculates that the mean age at marriage was 30.5 years; Pedder was just under 30.²⁸

At 29 and 35 years respectively, the difference in age between John and Maria drew the attention of contemporaries.²⁹ In 1834, a new arrival in Hobart Town related her first meeting with the Pedders, noting that a family friend who had known the Pedders 'in England' informed her that, eleven years into their marriage, John and Maria were 'the happiest couple he knows tho' she is older than Mr Pedder'.³⁰ Ellen Viveash's qualification that Maria was 'not much older, five years perhaps', implies that, while noteworthy, the age gap was no barrier to happiness.³¹ Correspondence between Maria's women friends in Van Diemen's Land further confirms that, whatever the original circumstances of their marriage, the Pedders were a 'very united couple' who enjoyed 'many years of happy and affectionate union'.³²

Family support for the marriage is also indicated. John and Maria were

²⁷ Neale, *Class and Ideology in the Nineteenth Century*, p. 111.

²⁸ Neale, *Class and Ideology in the Nineteenth Century*, pp. 105, 112.

²⁹ Maria's age at marriage is calculated from her baptism in the parish of Windlesham, Surrey, on 9 September 1787, and information on her death certificate. 'England Births and Christenings, 1538-1975', *FamilySearch*, <<https://www.familysearch.org>> accessed 24 April 2011; AOT RGD 35/5, Reg. No. 297/1855.

³⁰ Ellen Viveash to Mrs Tanner, 26 January 1834, in P. Statham (ed.), *The Tanner Letters. A Pioneer Saga of Swan River and Tasmania* (Nedlands, University of Western Australia Press, 1981), p. 73. This assessment is attributed to 'Mr Simpson', probably James Simpson, who acted as Pedder's agent in Port Phillip (see Chapter 3), and was named as an executor in his younger brother's will. *Argus*, 3 October 1848, p. 4; Will of William Pedder, Captain in His Majesty's Sixty Third Regiment of Foot of Hobart Town, Van Diemen's Land, 26 December 1833, AOT AD961/1/2, Will No. 166 (1843); TNA PROB 11/1992; C.A. McCallum, 'Simpson, James (1792?-1857)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/simpson-james-2665/text3713>> accessed 10 August 2011.

³¹ Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner Letters*, p. 73.

³² Mrs Weston to Jane Clark, 1 November 1855, University of Tasmania Special Collections, Royal Society of Tasmania Library Collection (hereafter RS), RS8/F7.

married in the bride's parish church in Brighton – a town which appears to have been the family base. Brighton had been the home of Pedder's mother, Jane, before her death in January 1823, and was also home to his sister.³³ Pedder's mother-in-law/aunt, Mary Everitt, lived at Brighton until her death in 1841, as did Maria's brother, Henry Everitt, who died there in 1847.³⁴ Witnesses to John and Maria's Brighton wedding included Pedder's brother, William, Maria's brother, Henry, and their cousin, Ellen Anne Weir.³⁵ Identifying Maria Everitt as Pedder's first cousin, and therefore an individual within his family and social orbit before their marriage, provides important background to this central and enduring relationship.

Alison Alexander's pioneering collective biography of governors' wives in Van Diemen's Land contrasts the significant role played by spouses with the limited attention they have received in the historiography.³⁶ As the wife of the chief justice, Maria Pedder has received a similar lack of scholarly attention.³⁷ Like so many officials' wives, Maria emerges fleetingly from the historical record. Appearing briefly in Henry Savery's satirical *The Hermit in Van Diemen's Land* as 'Mrs Doubtmuch' – in reference to her husband's reputation for judicial hesitancy – Maria is portrayed as a lady 'on the shady side of forty ... tall and sufficiently *en bon point* [attractively plump]'.³⁸

³³ Pedder's mother died at Brighton on 3 January 1823, and was buried there on 10 January. *Gentleman's Magazine, and Historical Chronicle. From January to June 1823*, 93 [133] (1) (1823), p. 94; *European Magazine and London Review* 83 (1823), p. 90; 'England Deaths and Burials, 1538-1991', *FamilySearch*, <<https://www.familysearch.org>> accessed 24 April 2011. On his sister, Jane Pedder, see section 2.3.

³⁴ Will of Mary Everitt, Widow of Brighton, Sussex, dated 17 October 1834, proved 8 February 1841, TNA PROB 11/1940; *Jackson's Oxford Journal*, 15 May 1847, p. 1.

³⁵ Ellen was probably the daughter of John and Maria's maternal aunt, Elizabeth Brucker, and John Weir. With her grandfather, George Brucker, and aunt, Elizabeth Everitt, Maria Everitt had witnessed John and Elizabeth's marriage in 1802. 'England Births and Christenings, 1538-1975', *FamilySearch*, <<https://www.familysearch.org>> accessed 24 April 2011; St Marylebone, Middlesex, Parish Registers, Marriages, John Weir Esquire to Elizabeth Brucker, by licence, 13 May 1802, p. 220, n. 660, 'London, England, Marriages and Banns, 1754-1921', <[ancestry.co.uk](https://www.familysearch.org)> accessed 18 May 2010.

³⁶ A. Alexander, *Obligated to Submit: Wives and Mistresses of Colonial Governors* (Hobart, Montpelier Press, 1999), pp. 1-3.

³⁷ cf. Bennett, *Sir John Pedder*, pp. 16, 112, for a misogynistic dismissal of the isolated and 'very prosaic life' of the 'childless' judge's wife.

³⁸ C. Hadgraft and M. Roe (eds.), Henry Savery, *The Hermit in Van Diemen's Land* (St Lucia, University of Queensland Press, 1964), pp. 74, 198. At the time Savery was writing, Maria

According to *The Hermit*, she had ‘rather a flushed complexion, darkish expressive eyes’, and a ‘countenance altogether beaming with much beneficence’.³⁹ Savery’s image of the benevolent judge’s wife is born out by contemporary sources. On her death in 1855, Maria was eulogised in the *Maitland Mercury* as a virtuous matron ‘much esteemed for an unostentatious but always active benevolence’.⁴⁰ The *Hobart Town Courier* remembered Lady Pedder as a ‘kind benefactress of the poor’, whose ‘virtues endeared her to a large and numerous circle of friends’.⁴¹ It is a sentiment echoed in Pedder’s choice of inscription for the tombstone of his ‘dearly beloved wife’: ‘*Multis Illa Bonis Flebilis Occidit*’, many a good man wept at her death.⁴²

While such Victorian platitudes might now seem trite, they provide valuable insights into acceptable public roles for bourgeois and elite colonial women in an era when the work of gentlewomen was largely centred on the home. Alexander identifies Maria’s contemporary, Eliza Arthur, as the first ‘model’ governor’s wife in Van Diemen’s Land.⁴³ The motherly Mrs Arthur was a ‘very proper’ consort and a ‘supporter of charities to help unfortunate women and children’.⁴⁴ As the wife of the first chief justice, there was no local exemplar for Mrs Pedder to follow. Her participation in the public domain mirrored that of the governor’s wife, and focussed on social and philanthropic duties.

In the 1830s, Maria Pedder directed her energies towards providing assistance to free women arriving in the colony. As a member of the Ladies’

would have been 42 years old.

³⁹ Savery, *The Hermit in Van Diemen’s Land*, p. 74.

⁴⁰ Supplement to the *Maitland Mercury*, 3 November 1855, p. 3.

⁴¹ *Courier*, 24 October 1855, p. 3. Maria Pedder died on 23 October 1855 from ‘Paralysis and [an] abdominal Tumour’. She was buried at St John’s Church of England, New Town. AOT RGD 35/5, Reg. No. 297/1855; NS656/74, No. 421, p. 28.

⁴² The inscription is adapted from Horace’s ode, ‘To Vergil, on the death of Quintilius’, *Carmina* 1:24. My thanks to Rosie Davidson of the Friends of the Orphan Schools for supplying a transcription of the tombstone, and to Dr Andrew Turner at the University of Melbourne for deciphering the damaged Latin inscription.

⁴³ Alexander, *Obliged to Submit*, p. 111.

⁴⁴ Alexander, *Obliged to Submit*, p. 111.

Immigration Committee formed in 1832,⁴⁵ Mrs Pedder joined in the 'benevolent exertions' to place the 'female Emigrants' in employment.⁴⁶ In London, the Secretary of State for the Colonies took a 'lively interest' in assisted female emigration as a means of addressing the imbalance of the sexes and thereby improving morality in the colonies; the 'zealous activity' of the Ladies' Committee ensured that housing and employment were provided for a series of arrivals.⁴⁷ Many of the emigrant women were quickly employed as 'Milliners or Dress Makers, or placed in the most respectable service', but there remained a number of 'doubtful character' who could not be placed with 'respectable employers'.⁴⁸ The *Hobart Town Courier* lamented that 'everyone in Hobart Town [was] sensible' of the prejudice that was excited against the assisted emigrants by the 'mixing together' of the 'respectable with the [morally] frail'.⁴⁹

The Pedders led by example, employing several assisted emigrants in their household,⁵⁰ and Pedder's interest in his wife's work is revealed in a letter of 1835, in which he informed Governor Arthur that, 'Mrs Pedder writes to Your Excellency about the last batch of free women. She thinks upon the whole more favourably than she did at first: and they have certainly found situations with a celerity which we none of us expected'.⁵¹ Evidently with the

⁴⁵ The Ladies' Immigration Committee first met on 23 August 1832. Mrs Pedder's name appears at the head of the list of Sub-Committee 4. AOT G033/1/11, ff. 808-809, reel Z430.

⁴⁶ Arthur to Goderich, 8 September 1832, G033/1/11, f. 795, reel Z430.

⁴⁷ Arthur to Goderich, 8 September 1832, G033/1/11, ff. 792, 795, reel Z430. On Goderich's plan for assisted female emigration, see also L.L. Robson, *A History of Tasmania, Volume I: Van Diemen's Land from the Earliest Times to 1855* (Melbourne, Oxford University Press, 1983), pp. 163-168. Emigrants arrived per *Princess Royal* (1832), *Vestal* and *Strathfieldsay* (1834), and *Sarah* and *Boadicea* (1836).

⁴⁸ Arthur to Goderich, 8 September 1832, G033/1/11, f. 796, reel Z430.

⁴⁹ *Hobart Town Courier*, 7 September 1832, p. 2. The *Courier* refers here to the emigrants on the *Princess Royal*.

⁵⁰ Mrs Pedder employed several emigrants as housemaids, including Margaret Drummond, 24, from the *Sarah*, and Matilda Moth, 19, from the *Boadicea*, at £12 per annum. 'An Alphabetical Return of the Disposal of the Free Female Immigrants per "Sarah"', 25 February 1835, AOT G033/1/19, ff. 281-282, reel Z437; 'An Alphabetical Return of the Disposal of the Free Female Immigrants per *Boadicea*', enclosure in George Everett to the Colonial Secretary, 29 February 1836, AOT G033/1/22, f. 163, reel Z440.

⁵¹ Pedder to Arthur, 1 March 1836, Papers of Sir George Arthur (hereafter Arthur Papers), vol. 10, Mitchell Library (hereafter ML) ZA 2170, reel MAV/FM4/ 3671.

support of her husband, Maria Pedder continued her work with free female emigrants into the 1850s, when she served as a patroness of the Tasmanian Female Emigration Association.⁵²

In addition to her work with the Ladies' Committee, Maria Pedder provided practical assistance to individual families, as demonstrated in a letter published in the *Brighton Patriot and Lewes Free Press* in 1835. Writing to their family in Sussex, James and Mary Wiggins recounted Mary's arrival in the colony.⁵³ Mary, a laundress, was joining her convict husband, James, who had been transported from Brighton in 1831.⁵⁴ She and their four children arrived aboard the *Strathfieldsay*, a female emigrant ship carrying almost 300 women.⁵⁵ The arrival of the ship attracted 'a number of spectators', among whom 'some rude and impertinent persons' subjected the emigrant women to 'a most painful and unnecessary ordeal' as they landed.⁵⁶ Mary Wiggins was one of the 'considerable number' of women who 'quitted the ship immediately on her arrival': some were 'removed by their friends'; others went ashore 'to seek their respective relations and acquaintances'.⁵⁷

While most members of the Ladies' Committee employed a woman from the ship,⁵⁸ Maria Pedder provided additional assistance to the Wiggins family.

⁵² *Hobart Town Courier*, 28 August 1850, p. 2; *Colonial Times*, 20 August 1850, p. 2; 6 September 1850, p. 3; Fund for Promoting Female Emigration, *First Report of the Committee*, March 1851, pp. 63-64, LSE Selected Pamphlets, <<http://www.jstor.org/stable/60225485>> accessed 10 January 2010; and C. Dickens (ed.), *The Household Narrative of Current Events (for the Year 1851,) Being a Monthly Supplement to Household Words conducted by Charles Dickens* (London, Bradley and Evans, 1851), p. 19, <http://www.archive.org/stream/householdnarrati51dick/householdnarrati51dick_djvu.txt> accessed 10 January 2010.

⁵³ *Brighton Patriot and Lewes Free Press*, 24 February 1835, p. 4. The Wiggins' letter, dated 29 September 1834, was published under the heading, 'Hobart Town, Van Diemen's Land'.

⁵⁴ A stone mason and bricklayer, Wiggins was transported for assault in 1831. Convict indent, James Wiggins, AOT CON14/1/2, ff. 45-46.

⁵⁵ Arthur to Stanley, 24 September 1834, AOT G033/1/17, f. 874, reel Z435. Mary Wiggins, 35, and four children arrived per *Strathfieldsay*, 13 August 1834.

⁵⁶ *Hobart Town Courier*, 22 August 1834, p. 2.

⁵⁷ Arthur to Stanley, 26 September 1834, Enclosure 1, 'Transmitting a Report of the Ladies Committee relative to the Free Female Emigrants per "Strathfieldsay"', G033/1/17, ff. 886-887, reel Z435.

⁵⁸ Alexander, *Obliged to Submit*, p. 126. Mrs Pedder employed twenty-six-year-old Anne Patton as a housemaid on £16 per annum. Arthur to Stanley, 26 September 1834,

When Mary Wiggins arrived, her husband was at work, and, although she found James 'in less than one hour', it was Maria Pedder who met Mary and the children when they disembarked.⁵⁹ As Mary reported, 'Mrs Pedder is very good to me – she gave me a sovereign as soon as I got on shore'; she also helped the family by getting the Wiggins' son 'into the school'.⁶⁰ Maria's personal connection to Brighton suggests that she probably knew (of) the Wiggins family in England. Women played a crucial role in maintaining family communication through the 'exchange of goods, information and services',⁶¹ and Maria Pedder appears to have been an obliging connection in Van Diemen's Land. During the Pedders' residence in Hobart Town, her sister-in-law, Jane Pedder, sent boxes from England, enclosing letters and parcels for friends and relatives, which Maria forwarded on.⁶² She evidently took on this role for the Wiggins family, too, for James and Mary's letter concludes by directing Wiggins' mother to send letters to Hobart Town 'by Mrs Pedder's parcels'.⁶³

As Maria's involvement with the Ladies' Immigration Committee illustrates, the wife of the chief justice was both permitted and required to engage publicly in appropriate philanthropic activities with individuals from a range of social classes. As the wife of a senior official, Maria also inevitably became a social arbiter in the colony. From the security of her own unquestionably respectable background, she also demonstrated her willingness to challenge the emerging conventions of Van Diemen's Land's caste society. In July 1834, Mrs Pedder took a young neighbour to a fashionable ball 'under her

Enclosure 2, 'An Alphabetical Return of the Free Female Emigrants per "Strathfieldsay"', 22 September 1834, G033/1/17, ff. 914-915, reel Z435.

⁵⁹ *Brighton Patriot and Lewes Free Press*, 24 February 1835, p. 4.

⁶⁰ *Brighton Patriot and Lewes Free Press*, 24 February 1835, p. 4.

⁶¹ R. Chartier, A. Boureau and C. Dauphin (trans. C. Woodall), *Correspondence: Models of Letter-Writing from the Middle Ages to the Nineteenth Century* (Princeton, Princeton University Press, 1997), p. 16.

⁶² For example, Jane Pedder included items from Mrs Weston in Brighton to her sister, Jane Clark, in Van Diemen's Land. Maria Pedder to Jane Clark, 12 April 1845, RS8/F44.

⁶³ *Brighton Patriot and Lewes Free Press*, 24 February 1835, p. 4. James Wiggins' convict indent indicates that he was illiterate. CON14/1/2, f. 45.

protection and auspices'.⁶⁴ Emily Lakeland's father had been Principal Superintendent of Convicts from 1820 until his death in 1828; her mother's second husband became a convict after their marriage in 1831.⁶⁵ Miss Lakeland and her family suddenly faced social exclusion, despite their former respectability.

Whether private or official, balls and other entertainments became sites for asserting and maintaining status within colonial society.⁶⁶ Maria's decision to invite Emily Lakeland to the ball was not, therefore, a neutral act.⁶⁷ In a world where women played a key role in 'policing the social borders',⁶⁸ Maria Pedder used her own status to re-assert Miss Lakeland's place in respectable society. It is therefore significant that, while Governor Arthur's nephews, Matthew Forster and John Montagu, 'took offence' at Miss Lakeland's 'intrusion ... into such Society', his wife 'saw no impropriety in Mrs Pedder's conduct'.⁶⁹ As the wife of the chief justice, Maria's gender and status allowed her to privilege friendship over the pretensions of colonial society with the support of the ultimate arbiter, the governor's wife.

⁶⁴ RS25/2/(4), G.T.W.B. Boyes, *Diary of G.T.W.B. Boyes, Van Diemen's Land, Feb 28th, 1833-June 1st, 1835*, University of Tasmania Library Special and Rare Materials Collection, Australia (Unpublished), 17 July 1834, f. 105, <[http://eprints.utas.edu.au/8848/1/rs_25_2_\(4\)_GWT_Boyes_Diary_28th_February_1833-June_1st_1835.pdf](http://eprints.utas.edu.au/8848/1/rs_25_2_(4)_GWT_Boyes_Diary_28th_February_1833-June_1st_1835.pdf)> accessed 4 September 2011; Alexander, *Obliged to Submit*, p. 121.

⁶⁵ The Lakelands lived near the Pedders in Macquarie Street. J. Ross, *The Van Diemen's Land Anniversary and Hobart Town Almanack for the Year 1831, with Embellishments* (Hobart, J. Ross, 1831), pp. 60, 62. L.L. Robson, 'Lakeland, John (-1828)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/lakeland-john-2320/text3015>> accessed 10 August 2011. Boyes records that, 'Miss Lakeland's Grandfather [had] been a convict and her mother [had] married a man who is now a Convict but was not so at the period of her Marriage'. *Diary of G.T.W.B. Boyes*, 17 July 1834. Original emphasis.

⁶⁶ K. McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne, Melbourne University Press, 2004), p. 37.

⁶⁷ Penny Russell distinguishes between the social and political implications of such invitations: 'invitations to men alone acknowledged political status, ... invitations which included women implied social acceptance'. P. Russell, *'A Wish of Distinction': Colonial Gentility and Femininity* (Melbourne, Melbourne University Press, 1994), p. 17.

⁶⁸ M. Langland, *Nobody's Angels: Middle-class Women and Domestic Ideology in Victorian Culture* (Ithaca, Cornell University Press, 1995), p. 31; McKenzie, *Scandal in the Colonies*, p. 37.

⁶⁹ Boyes, *Diary of G.T.W.B. Boyes*, 17 July 1834. For Forster and Montagu, see section 3.2.

Behind the scenes, Maria Pedder also engaged with her husband's professional life. Letters from the chief justice to his close friend and superior, George Arthur, reveal that Pedder valued his wife's counsel. Two examples from 1836 illustrate this point. In response to changing public attitudes to colonial judges holding both judicial and executive office, Pedder was compelled by the Colonial Office to resign from the Executive Council. The chief justice disputed the incompatibility of his roles and was concerned to avoid public speculation about the timing of his resignation. Pedder entreated Arthur 'not reveal to any one the real cause of it', confiding that he had 'not dropped the slightest hint of it to any one *except Mrs Pedder*'.⁷⁰ A few months later, Governor Arthur was recalled to London after twelve years in Van Diemen's Land. Arthur sent a copy of his response to the imperial government's decision to Pedder, who assured his friend that 'I have read with attention *and so has Mrs Pedder* the paper you sent me ... *We both think* it would be a pity to alter a single word'.⁷¹ These examples suggest that the Pedders' marriage was a partnership (albeit unequal),⁷² in which Maria acted as a trusted adviser and confidante.

Pedder's correspondence acknowledges that his wife sometimes acted as an amanuensis.⁷³ Other colonial sources suggest that Maria Pedder also took a more active role. Rejoicing in Arthur's recall in 1836, the anti-government *Colonial Times* reported, for example, that, 'No sooner had the recal [*sic*] of Colonel Arthur become public, than, agreeable to *his* system, his friends were ordered to "*get up an address*"' to show the Secretary of State 'how very much he was beloved'.⁷⁴ When a 'general address' attracted too few signatures, an 'aristocratical address' was proposed.⁷⁵ 'Mrs Pedder wrote out a very fair

⁷⁰ Pedder to Arthur, 1 March 1836, Arthur Papers, vol. 10, ML ZA 2170. Editorial emphasis.

⁷¹ Pedder to Arthur, 5 July 1836, Arthur Papers, vol. 10, ML ZA 2170. Editorial emphasis.

⁷² cf. P. Russell, 'Wife stories: Narrating marriage and self in the life of Jane Franklin', *Victorian Studies* 48 (1) (2005), p. 46. Russell argues that Maria's contemporary, Jane Franklin, understood her marriage to Governor Sir John Franklin as 'an unequal contract in which her own inferior place was clearly defined'.

⁷³ cf. Pedder to Arthur, [21 March 1827?], Arthur Papers, vol. 9, ML ZA 2169.

⁷⁴ *Colonial Times*, 31 May 1836, p. 4. Original emphasis.

⁷⁵ *Colonial Times*, 31 May 1836, p. 4.

one', the *Colonial Times* reported, 'which Mr Pedder signed and sent to the Colonial Treasurer, to go round in his carriage, and get as many signatures to it as he could!'⁷⁶ Apparently referring to this incident in a letter of 1839, the wife of Arthur's gubernatorial successor described Maria Pedder as a 'sensible & benevolent woman who writes well – & was therefore said to write for her husband, and to have been the right hand of Col. Arthur'.⁷⁷

Lady Franklin's writing for her husband ultimately undermined his public standing in the 'hostile colonial world'.⁷⁸ In what Penny Russell reads as an effort to 'normalize [*sic*] and universalize [*sic*] her activity', Jane Franklin had remarked to her sister in 1839 that 'I suppose every woman whose husband is in public life helps him if she can & if he gives her the opportunity which he will not fail to do if he can trust in her ability & discretion'.⁷⁹ As far as the archival evidence allows us to judge, Maria Pedder's writing – in the case of the Arthur address, and in the absence of any concerted antagonism towards the chief justice – does not appear to have damaged her husband's reputation. And while Pedder's attitude was by no means normal or universal, his reliance on his wife's help and trust in her ability and discretion is evident from his correspondence. Illuminating Maria's role in their marriage clearly adds a valuable new dimension to understanding the chief justice, yet it is an aspect of his life which has been conspicuously neglected in existing accounts.

2.2 An illegitimate niece and nephew

Exploring the private sphere of the family also offers new insights into Pedder's relationship to the contested nature of respectability. In a world

⁷⁶ *Colonial Times*, 31 May 1836, p. 4, which prints the 'aristocratical address', dated 26 May.

⁷⁷ Jane Franklin to [her sister] Mary Simpkinson, 13 February 1839, Papers of Sir John and Lady Franklin: Franklin, Jane, Lady, 23 letters to Mary Simpkinson from Van Diemen's Land, 7 October 1837 – 19 April 1853, MS 248/174/5. Scott Polar Research Institute. National Library of Australia microfilm reel G2486; C.R. Joel, *A Tale of Ambition and Unrealised Hope: John Montagu and Sir John Franklin* (Melbourne, Australian Scholarly Publishing, 2011), p. 246.

⁷⁸ Russell, 'Wife stories', p. 49.

⁷⁹ Jane Franklin to Mary Simpkinson, 13 February 1839, MS 248/174/5, reel G2486; Joel, *A Tale of Ambition*, pp. 89-90; Russell, 'Wife stories', p. 49.

where personal morality increasingly formed the 'only legitimate basis' for public authority,⁸⁰ Chief Justice Pedder's rectitude was acknowledged and admired by contemporaries. Yet, this apparently unassailable respectability masks a more complex and interesting reality, for his family was touched by a key source of potential scandal: illegitimacy.

Kirsten McKenzie's comparative study of contemporary Cape Town and Sydney highlights the role of scandal in illuminating the shifting boundaries of colonial respectability. Where knowledge of private transgressions of public morality moved beyond the oral realm of gossip, 'open scandal' threatened to destroy the reputation of individuals and families.⁸¹ In the case of Pedder's brother judge at Cape Town, for example, family scandal took on political dimensions, when Chief Justice Wylde's career was threatened by an official inquiry into rumours of an incestuous relationship with his daughter.⁸² The existence of an illegitimate niece and nephew in Van Diemen's Land had no such implications for Chief Justice Pedder. Indeed, the children were all but invisible before they joined their uncle's household in 1843, and they are notably absent from the historiography. For this reason, recovering the children's existence adds a significant new dimension to our understanding of Pedder's life-world.

Between July 1830 and December 1833, Pedder's younger brother was stationed in Van Diemen's Land with His Majesty's 63rd Regiment of Foot.⁸³ Captain William Pedder (1796-1837) had already seen colonial service as a member of the first contingent of British settlers at the Swan River colony in 1829.⁸⁴ Transferred to his regiment's headquarters in Hobart Town in 1830,

⁸⁰ K.M. Reid, *Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Manchester, Manchester University Press, 2007), p. 11.

⁸¹ McKenzie, *Scandal in the Colonies*, pp. 8-9.

⁸² K. McKenzie, 'Women's talk and the colonial state: The Wylde scandal, 1831-1833', *Gender & History* 11 (1) (1999), p. 34.

⁸³ William Pedder arrived at Hobart Town on 3 July 1830, having paid £45 to Captain Hudson for his passage aboard the *Orelia*. Accounts, letters and associated papers used by Sorell in the administration of the estate of Captain William Pedder, AOT NS363/1/2.

⁸⁴ Lieutenant William Pedder is named among the officers as part of a detachment of

Captain Pedder participated in garrison and internal security duties. The year after his arrival in the colony, William bought a cottage in Davey Street, where he set up home with 20-year-old Frances Ann Preddy (1811-1843).⁸⁵ Their union produced two natural children: Jane Ann Preddy *alias* Pedder, born in Hobart Town in 1832,⁸⁶ and William Lewes Pedder, born in Madras c. 1837.⁸⁷ The relationship between William and Frances replicates many of the conventional challenges of 'interclass liaisons' between gentlemen and women of lower status.⁸⁸ It becomes relevant to this study because it presents an opportunity to explore these issues in a community where William's brother and sister-in-law/cousin were social arbiters.

Illegitimacy was a 'moral litmus test' for middle-class Victorians; during the Georgian colonial period, however, its meanings were shaped by the social background of the parents.⁸⁹ William Pedder's paternity of Jane and William Lewes was acknowledged and accepted by his family, albeit discreetly.⁹⁰ As a free settler, Fanny Preddy risked moral censure and her children faced social

'100 persons', including free women and children, who settled at Swan River in 1829. He was gazetted captain, by purchase, in August 1830, but his brother was already referring to him as 'Captain Pedder' in correspondence from 1829. Somerset to Twiss, 24 January 1828, *HRA* III, VI, p. 598; *London Gazette*, 3 August 1830, pp. 1685-1686; Pedder to Arthur, [n.d.] [1829], Arthur Papers, vol. 9, ML ZA 2169.

⁸⁵ William Pedder paid £400 to Richard Lane, 'being the full consideration ... for the House in Davy [*sic*] Street'. Receipt dated 27 October 1831, NS363/1/2.

⁸⁶ There was little incentive or compulsion for free women to register illegitimate births in Van Diemen's Land before the advent of civil registration in 1838, and Jane's exact date of birth and parentage are not recorded in the official record. Indirect evidence suggests she was born between August and October 1832. R. Kippen and P. Gunn, 'Convict bastards, common-law unions and shotgun weddings: Premarital conceptions and exnuptial births in colonial Tasmania', *Social Science History Association Conference*, 2005, p. 15; John James Holland to William Sorell, 17 April 1843, and Statutory Declaration of John James Holland, 5 May 1843, NS363/1/2.

⁸⁷ William Lewes Pedder matriculated at Exeter College, Oxford, aged 19, on 27 June 1856, suggesting that he was born between June 1836 and his father's death in June 1837. J. Forster (ed.), *Alumni Oxonienses: The Members of the University of Oxford, 1500-1886: Their Parentage, Birthplace, and Year of Birth, with a Record of their Degrees: Being the Matriculation Register of the University*, Vol. III (Nendeln, Kraus Reprint, 1968), p. 1088; Holland to Sorell, 17 April 1843, NS363/1/2.

⁸⁸ J.R. Gillis, 'Sexual relations and the risks of illegitimacy in London, 1801-1900', *Feminist Studies* 5 (1) (1979), p. 157.

⁸⁹ Gillis, 'Sexual relations', p. 142.

⁹⁰ The children's names emphasise their paternity: Jane was named for her paternal grandmother and/or aunt, while William Lewes was named for his father and uncle, and took the Pedder surname from the start.

exclusion, but with the financial support of her partner, her situation was in stark contrast to that of the convict mothers for whom non-marital childbearing was an 'offence' to be punished within the convict management system.⁹¹ Historical demography on consensual partnerships and exnuptial births tends to focus on the lowest social strata: the convicts and emancipists whose lives were under regular official scrutiny.⁹² Comparatively little is known about relationships between free settlers of higher social status, who had both the opportunity and need for discretion. Under the influence of colonial authorities and reformers, non-marital partnerships became increasingly unacceptable. The preference of convicts and emancipists for cohabitation reflects the moral values of the urban poor from which they were largely drawn; the expanding free population, however, sought to distance itself from these mores and impose bourgeois values on colonial society.⁹³

Alan Atkinson characterises the moral universe of New South Wales in the 1830s as a 'transitional period, full of ambiguity'.⁹⁴ In Van Diemen's Land, the conservative moral climate of the Victorian age was prefigured by Governor Arthur, whose Evangelical morality was stamped on his administration from the mid-1820s. Convict 'immorality' was punished, and the relationships of civil and military officials came under scrutiny. Nonetheless, some otherwise outwardly respectable men continued to cohabit with their non-convict partners into the 1830s. As the cases of Ernest Slade in Sydney and Judah Solomon in Hobart Town illustrate, these open secrets only became problematic when they challenged the conventions of respectable society by coming to official notice.

Police Magistrate and Superintendent of the Hyde Park Barracks in Sydney,

⁹¹ Kippen and Gunn, 'Convict bastards', pp. 14-15. Single convict women were punished for the 'offence of an illegitimate child'.

⁹² G.A. Carmichael, 'From floating brothels to suburban semirespectability: Two centuries of nonmarital pregnancy in Australia', *Journal of Family History* 21 (3) (1996), p. 285.

⁹³ Carmichael, 'From floating brothels', p. 286.

⁹⁴ A. Atkinson, 'The moral basis of marriage', *The Push from the Bush* (2) (1978), p. 109.

Ernest Augustus Slade was dismissed from office when his domestic arrangements came to the attention of the governor of New South Wales in 1834. Known publicly as a 'single man', Slade was discreetly 'living with a free girl' with whom he had an illegitimate child.⁹⁵ In his evidence to the Molesworth Select Committee on Transportation three years later, Slade acknowledged the 'impropriety' of living with a woman who was not his wife, but maintained that it was 'notorious that other men were living in the same way'.⁹⁶ Indeed, the official reason for Slade's dismissal centred not on the fact that he was living in 'concubinage', but that he had brought a young female servant into 'a house where virtue could not be safe'.⁹⁷ At a time of 'moral anxiety' about assisted female emigration schemes, it was unusual to assign a free female servant to a single man, and Slade was soon accused of getting the girl 'for prostitution'.⁹⁸ Countering that Lavinia Winter had been engaged at the suggestion of his partner to nurse their infant son, Slade was supported in his denial by Winter, but agreed it would be better for her to go 'into a respectable married family'.⁹⁹

While Slade believed his 'immorality' was merely the pretext for his dismissal,¹⁰⁰ the case highlights two key offences against the gendered morality of colonial society, the more serious of which centred on the threat to the virtue of the free servant, Lavinia Winter. As the Pedders knew from direct experience, the Colonial Office's assisted emigration scheme received adverse publicity in the colonies: it played on bourgeois anxieties about

⁹⁵ Evidence of Ernest Augustus Slade to the Select Committee on Transportation, 25 April 1837, *British Parliamentary Papers, Report from the Select Committee on Transportation together with the Minutes of Evidence, Appendix and Index, ordered, by the House of Commons, to be printed, 14 July 1837. Transportation, Vol. 2, Session 1837* (Shannon, Irish University Press, 1968), pp. 53, 55; *Sydney Gazette*, 10 May 1838, p. 4; McKenzie, *Scandal in the Colonies*, p. 106.

⁹⁶ *Report from the Select Committee on Transportation*, p. 55.

⁹⁷ *Report from the Select Committee on Transportation*, p. 55.

⁹⁸ McKenzie, *Scandal in the Colonies*, p. 106; A. Hammerton, 'Without natural protectors: Female immigration to Australia, 1832-1836', *Historical Studies* 16 (65) (1975), pp. 539-566; *Report from the Select Committee on Transportation*, p. 54.

⁹⁹ *Report from the Select Committee on Transportation*, p. 54; Hammerton, 'Without natural protectors', p. 563.

¹⁰⁰ Slade believed he was dismissed because he had 'become obnoxious' to the governor, Sir Richard Bourke. *Report from the Select Committee on Transportation*, pp. 55-56.

single women travelling alone and on fears that assisted female immigration would add to, rather than combat, colonial immorality.¹⁰¹

The domestic arrangements of Hobart Town merchant, Judah Solomon, posed several challenges to respectable society in Van Diemen's Land. As a transported convict, Solomon was subject to greater scrutiny than free settlers. In 1830, he faced charges of 'living in a state of illicit intercourse' with his housekeeper, Elizabeth Howell, with whom he had an illegitimate son.¹⁰² Unlike Slade or William Pedder, Solomon had a wife in England. Esther Solomon had refused a divorce when her husband was transported in 1820. Her arrival in Hobart Town in 1832, 'to join her husband, after many years separation [...] produced some little embarrassment of a delicate nature', given what the colonial press discreetly referred to as the '*situation of the parties*'.¹⁰³ While Judah's adulterous relationship was common knowledge, it was only brought to official attention when Esther Solomon engaged in a public campaign against her husband's petition to obtain an absolute pardon. As Hamish Maxwell-Stewart points out, by challenging the signatories of Judah's petition to maintain their support and thereby condone his adultery, Esther effectively challenged their own claims to respectability.¹⁰⁴

As the cases of Slade and Solomon illustrate, transgressing the conventions of respectable society was tolerated until it became a matter of public record. In this context, it is significant that William Pedder's domestic arrangements do not appear to have come to official notice, despite – or perhaps because of – Governor Arthur's enduring friendship with the Pedder family. During the

¹⁰¹ Hammerton, 'Without natural protectors', p. 557.

¹⁰² A. Rand, 'Temple House and the Judah Solomon family' in P. Elias and A. Elias (eds.), *A Few from Afar: Jewish Lives in Tasmania from 1804* (Hobart, Hobart Hebrew Congregation, 2003), p. 23. Their son, Joseph Solomon, was born c. 1825.

¹⁰³ H. Maxwell-Stewart, 'Land of sorrow, land of honey: Aspects of the life of Judah Solomon' in P. Elias and A. Elias (eds.), *A Few from Afar: Jewish Lives in Tasmania from 1804* (Hobart, Hobart Hebrew Congregation, 2003), p. 14; *Colonial Times*, 18 December 1832, p. 2. Original emphasis.

¹⁰⁴ Maxwell-Stewart, 'Land of sorrow, land of honey', pp. 17-18.

period when Captain Pedder was living with Frances Preddy and their infant daughter in Davey Street, he continued to serve as town adjutant, with an office in public/private space of Government House, despite the moral ambiguity of his domestic situation.¹⁰⁵

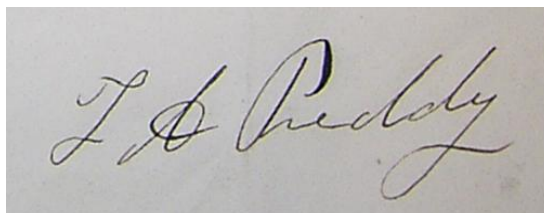


Figure 6: Signature of Frances Ann Preddy.¹⁰⁶

Image reproduced courtesy of the Tasmanian Archive and Heritage Office

Fanny Preddy's arrival in Van Diemen's Land from the Swan River colony in June 1831 indicates that she was a free settler,¹⁰⁷ and her confident signature confirms she was literate.¹⁰⁸ Questioned by the Government Resident in Fremantle before her departure, Fanny identified herself as a milliner from the fashionable spa town of Bath, and declared that she was 'not indentured to any person'.¹⁰⁹ Millinery was a skilled trade and a respectable occupation for women of lower social status. In the bourgeois world, however, women employed outside the home were 'liminal figures'.¹¹⁰ The social distance between her occupational group and William Pedder's family is neatly illustrated by an advertisement placed in the *Courier* only a few months before her death in 1843. In it, Sir John Pedder invited free women skilled in 'plain needlework, as well as millinery and dressmaking' to apply for the

¹⁰⁵ Arthur to Governor Bourke, 15 November 1833, Letters of Colonel George Arthur, ff. 60, 69-70, 100-101, Mitchell Library, State Library of New South Wales, ML A1962, reel CYPOS980; P. Chapman (ed.), *The Diaries and Letters of G.T.W.B. Boyes: Volume I, 1820-1832* (Melbourne, Oxford University Press, 1985), p. 349, n. 46; Ross, *The Van Diemen's Land Anniversary and Hobart Town Almanack for the Year 1831*, p. 59.

¹⁰⁶ Signature on a rent receipt dated 20 June 1839, NS363/1/2.

¹⁰⁷ 'Miss Preddy' arrived in Hobart Town on 27 June. *Hobart Town Courier*, 2 July 1831, p. 2.

¹⁰⁸ F.A. Preddy to the Colonial Secretary, Fremantle, 29 April 1831, State Records Office Western Australia, Colonial Secretary's Office, Series no. 2941, Correspondence – Inwards, item no. 15, consignment no. 36, f. 15.

¹⁰⁹ Government Resident, Fremantle, to the Colonial Secretary, 4 May 1831, State Records Office Western Australia, Colonial Secretary's Office, Series no. 2941, Correspondence – Inwards, item no. 15, consignment no. 36, ff. 35-36.

¹¹⁰ D. Simonton, *A History of European Women's Work: 1700 to the Present* (London and New York, Routledge Press, 1998), pp. 152-153; McKenzie, *Scandal in the Colonies*, p. 89.

position of lady's maid in his household.¹¹¹

As Kippen and Gunn's demographic study of ex-nuptial births in colonial Van Diemen's Land/Tasmania study points out, the massive sexual imbalance in colonial society allowed many women to marry 'above their station'.¹¹² At the higher end of the social strata, additional pressures prevented William from contracting a marriage with Fanny Preddy. An important consideration lay in William Pedder's occupation. In an age when wives and families still made up an 'integral part of the military train', the British Army generally discouraged marriage as incompatible with army life.¹¹³ As a commissioned officer, William was not subject to regulations restricting marriage among the men; instead, informal constraints upon marriage amongst the officer class were more likely to be governed by social and financial considerations.

It is clear from the documentary evidence that William supported Fanny financially, especially after the birth of their daughter. Papers collected by the administrator of William Pedder's estate in the 1840s – including receipts for jewellery, sheet music, and a licence for two 'black and brindle' terriers – provide glimpses of William and Fanny's domestic arrangements in Hobart Town during the 1830s.¹¹⁴ After William's departure with his regiment for the Madras Presidency at the end of 1833,¹¹⁵ he continued to pay for accommodation for Fanny and Jane in Hobart Town, as well as providing for the payment of a regular income via a local agent until Fanny joined him in India *circa* 1836.¹¹⁶

¹¹¹ *Courier*, 21 April 1843, p. 1.

¹¹² Kippen and Gunn, 'Convict bastards', p. 10. Kippen and Gunn classify husbands as 'labourers' or 'non-labourers'.

¹¹³ H.E. Raugh, *The Victorians at War, 1815-1914. An Encyclopaedia of British Military History* (Santa Barbara, ABC-CLIO, 2004), p. 345.

¹¹⁴ Various receipts, AOT NS363/1/2.

¹¹⁵ Captain Pedder departed Hobart Town per *Lord Lyndock*, 28 December 1833, AOT MB2/39/1/1, p. 446.

¹¹⁶ He paid William Harris £8-5- for '1 Months Board &c' for 'Miss Preddie' and 'Child', 21 April 1835, NS363/1/2. It is unclear when Fanny joined William in Madras, but it is likely to have been in 1836, as William Lewes was born *circa* 1837. The family appears to have been living at Vepery, just outside Fort St George, Madras. William Pedder to Lieutenant Darling, 30 March 1837, AOT AD961/1/2; TNA PROB 11/1992.

In Madras, William made further attempts to provide for Fanny. In a letter written only weeks before his death in 1837, Captain Pedder instructed a colleague to ensure that all his property 'may be handed over to Fanny in order that she may do as she likes with it and that it may not be sold according to the usual course of military usage'.¹¹⁷ William clearly intended the letter to suffice in case of any dispute involving his estate, entreating Lieutenant Darling, 'Pray shew [*sic*] this to all concerned and be pleased to see my wishes complied with'.¹¹⁸ This testamentary paper, later annexed to William Pedder's Hobart Town will, confirms that, although he and Fanny remained unmarried, he was determined to provide for his partner. The chance survival of papers relating to William Pedder's contested nuncupative will also provides a rich seam of evidentiary material from which to reconstruct family relationships.

His brother's sudden death at Madras on 24 June 1837 'after a few days illness' affected Pedder deeply.¹¹⁹ As he confided to Arthur, William's death was 'a cruel blow to me. I loved him so dearly'.¹²⁰ Thinking of their sister in England, who 'had not heard of it' at the time of her last letter, Pedder took solace in the fact that he had the 'comfort and support which others, who loved him no less dearly, are without'.¹²¹ One of those without support was Fanny Preddy, alone in India with her infant son, and financially insecure despite William's intentions.

Fanny and Jane were provided for by William Pedder's Hobart Town will of 1833.¹²² Save for the provisions of his father's 1837 deathbed will, however, William Lewes was 'shut out altogether' and 'in the true sense of the Word an

¹¹⁷ W. Pedder to Darling, 30 March 1837, AOT AD961/1/2; TNA PROB 11/1992.

¹¹⁸ W. Pedder to Darling, 30 March 1837, AOT AD961/1/2; TNA PROB 11/1992.

¹¹⁹ *Hobart Town Courier*, 22 September 1837, p. 2; *Sydney Herald*, 28 September 1837, p. 2. In the church of St Mary at Fort St George, Madras, Captain Pedder's name was among several 'engraved on a tablet' to the memory of the officers of the 63rd Regiment who died there between 1834 and 1837. F.E. Penny, *Fort St George, Madras; A Short History of our First Possession in India* (London, Swan Sonnenschein, 1900), pp. 220, 224.

¹²⁰ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹²¹ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹²² Will of William Pedder, 26 December 1833, AOT AD961/1/2; TNA PROB 11/1992.

Orphan'.¹²³ With her son, Fanny returned to Hobart Town by the beginning of 1839 to take charge of her daughter.¹²⁴ Jane had remained in Van Diemen's Land in the care of foundry-owners, Mr and Mrs Harris, with whom she and her mother had boarded before Fanny's departure for India.¹²⁵ Sir John Pedder clearly had every confidence in the couple, writing later that William Harris was a 'very good man and both he and his wife were very kind to the child'.¹²⁶

With her marriage to emancipist police clerk, John James Holland, in August 1839,¹²⁷ Fanny and her children obtained a measure of security. They also gained an advocate whose legal knowledge and commitment to his new family provide many of the material traces of the inheritance dispute and reveal intimate details of family life. Transported for life for highway robbery in 1821, Holland (c. 1794-1876), had formerly practised as an 'attorney', much like John and William Pedder's father.¹²⁸ While he belonged to the 'Educated Class', he was not, in the chief justice's view, among the 'Gentleman Convicts'.¹²⁹ How John and Maria Pedder reacted to Fanny Preddy's marriage to John Holland is unclear. The illegitimacy of Fanny's children transgressed bourgeois constructions of feminine morality; her marriage protected them with the semblance of legitimacy. Indeed, the marriage notice which appeared in the colonial press named Fanny as 'Mrs Frances Anne Preddy, late of Madras', further obscuring her identity and the children's origins.¹³⁰

¹²³ Holland to Sorell, 17 April 1843, NS363/1/2.

¹²⁴ Statutory declaration of John James Holland, 5 May 1843, NS363/1/2.

¹²⁵ In 1835, Harris' foundry was located at 86 Macquarie Street; the Pedders' home was at number 29. H. Melville, *The Van Diemen's Land Almanack for the Year 1835* (Hobart Town, H. Melville, 1835), pp. 152, 159.

¹²⁶ Pedder to William Sorell, 6 May 1843, AOT NS363/1/2.

¹²⁷ Fanny married Holland, a widower, at St David's Church by 'Special License [*sic*]' on 17 August 1839. *Colonial Times*, 20 August 1839, p. 7; AOT RGD37, Reg. No. 415/1839.

¹²⁸ Holland arrived in the colony per *Malabar* on 21 October 1821, and was soon appointed to the Police Office. Conduct record, John James Holland, AOT CON31/1/18, f. 119. A 'Runaway Notice' published in 1825 describes him as an 'attorney'; however, the *Malabar* ship's muster records that he was a 'lawyer's clerk'. *Hobart Town Gazette*, 4 March 1825, p. 1S; AOT CS01/1/403, ff. 219-220, reel Z1846.

¹²⁹ Pedder distinguished 'attornies [*sic*], clerks, shopmen and book keepers' from the 'Gentlemen Convicts'. Pedder to Arthur, 10 March 1827, *HRA* III, V, p. 686.

¹³⁰ *Colonial Times*, 20 August 1839, p. 7.

Holland's respectability, on the other hand, was challenged by his status as an emancipist. As Maria Pedder had experienced only five years earlier with Emily Lakeland, any link to convictism threatened to exclude all family members, including step-children, from respectable society. The Preddy-Holland marriage therefore adds another layer to our understanding of why the children were not publicly recognised as part of the chief justice's family while their parents were alive.

Correspondence between Holland, Sir John Pedder and the estate's administrator, William Sorell, provides insights into the upbringing of the two children. Acknowledging that Jane and William Lewes were not 'common Creatures', Holland affirmed that he and their mother had 'neither spared pains or [*sic*] expense in acting towards them in the manner their deceased Parent intended'.¹³¹ As Holland put it, 'tho' the dear Creatures were illegitimately born', they were 'legitimately bred in every respect'.¹³² 'Miss Jane' in particular was described as 'a young Lady, of rather high notions, (truly legitimate)', which he and Fanny did 'not wish to improperly or hastily check' for want of funds.¹³³

It is clear from the correspondence that Holland struggled to support his step-children on the 'limited Income' of a police clerk.¹³⁴ As he reminded Sorell in 1843, it was 'evident from all the Papers that the late Captain Pedder on his deathbed intended all "for Fanny and her two Children"'; and Holland remained 'convinced that Sir John [Pedder] always intended, if possible to have put his intention in force'.¹³⁵ The protracted dispute over William Pedder's nuncupative will ended on 30 July 1843 with Fanny's sudden death, 'after an illness of a few hours only'.¹³⁶ Holland's gentle threat of 'applying to

¹³¹ Holland to Sorell, 17 April 1843, AOT NS363/1/2.

¹³² Holland to Sorell, 17 April 1843, AOT NS363/1/2.

¹³³ Holland to Sorell, 29 April 1843, AOT NS363/1/2.

¹³⁴ Holland to Simpson, 22 July 1842, AOT NS363/1/2. At £150 per annum, his salary was one-tenth of the chief justice's.

¹³⁵ Holland to Sorell, 17 April 1843, AOT NS363/1/2.

¹³⁶ *Courier*, 11 August 1843, p. 2; AOT RGD37/1, No. 1758.

the Insolvent Debtors Court' and resigning his 'Situation' if funds were not released from William Pedder's estate could now be forgotten.¹³⁷ The Pedders were also spared the public scrutiny of a hearing in the ecclesiastical jurisdiction of the Supreme Court.¹³⁸

Fanny Holland's children joined their aunt and uncle at *Newlands* almost immediately after her death.¹³⁹ Set on 29 acres near the 'pretty village of New Town', the six-bedroom house afforded space and agreeable surroundings for the children.¹⁴⁰ Pedder's correspondence confirms that Jane, at least, had been 'living in, and as a part of, my family' since the death of her mother, and 'during that time / upwards of eight years / has been maintained and educated solely by me'.¹⁴¹ Installed in the judge's household, the children took their place in respectable society. In a small community where 'everybody knows everybody's birth, parentage and education',¹⁴² Jane's genteel upbringing allowed her to make a good marriage, despite her illegitimacy. When she married Ensign Loftus Nunn of the 99th Regiment of Foot at St David's Cathedral on 4 December 1851, the 'reputed daughter' of Fanny Preddy was acknowledged as 'Jane Ann Pedder, niece of Sir John Pedder of Newlands' – her parentage obscured, on the public record at least, by the status of her eminently respectable uncle.¹⁴³

William Lewes was sent to England in 1846, with Rev Thomas Ewing and his

¹³⁷ Holland to Sorell, 17 April 1843, AOT NS363/1/2.

¹³⁸ Holland's correspondence indicates that papers were being prepared for such a case, but no documents relating to William Pedder's estate are to be found in AOT SC74/1/1-29, Documents in cases in ecclesiastical jurisdiction (including probate).

¹³⁹ Fanny died on 30 July and 'had charge of her (Jane) until that day'. Holland to Sorell, 3 October 1843, NS363/1/2.

¹⁴⁰ *Courier*, 26 May 1855, p. 1; [D. Burn], 'Van Diemen's Land: Moral, physical, and political', *Colonial Magazine and Commercial Maritime Journal* 2 (7) (May, 1840), p. 295.

¹⁴¹ Pedder writes in the context of the provisions in his brother's Hobart Town will for Jane's educational and other expenses. Pedder to Sorell, 6 November 1851, AOT NS363/1/2.

¹⁴² G.T. Lloyd, *Thirty-three Years in Tasmania and Victoria* (London, Houlston and Wright, 1862), p. 283.

¹⁴³ John and Maria Pedder witnessed the marriage. Jane is described in her father's will as 'the daughter or reputed daughter of Frances Anne Preddy'. *Courier*, 10 December 1851, p. 2; Register of Marriages, St David's, Hobart, AOT NS282/10/1/4, No. 102, reel Z2247; Will of William Pedder, 26 December 1833, AD961/1/2; TNA PROB 11/1992.

family, possibly for his education.¹⁴⁴ The Pedders' affection for their nephew is highlighted by Lady Pedder, who told a family friend in 1847 that she and Sir John were eagerly anticipating the return of 'our little William [...]. We are very anxious to see him again'.¹⁴⁵ 'Should Mr Ewing remain in England', she continued, 'we have requested him to send Wm [sic] out with some trusty Captain in some well known Ship'.¹⁴⁶ William Lewes rejoined the family in Van Diemen's Land at the beginning of 1848.¹⁴⁷ He appears to have been educated privately in Hobart Town, as his name does not appear among the pupils of the new Anglican boys' school dedicated to Archdeacon Hutchins, despite his uncle's personal support for the institution.¹⁴⁸

In the early 1850s, William Lewes boarded at Christ College, at Bishopsbourne, in the north of the island. Sir John Pedder's intention that his nephew should be educated as a gentleman is reflected in his choice of this Church of England college, described by a contemporary visitor to Van Diemen's Land as 'a sort of school and university for the education of the elder youths, preparing for the higher professions and upper walks in life'.¹⁴⁹ In 1853, William Lewes won a 'Public Prize' in the senior class for Classics, and was named as one of those leaving the college 'to study at university' at the end of 1854.¹⁵⁰

¹⁴⁴ 'Mr Pedder' departed Hobart Town for London with the Rev Ewing and his family aboard the *Jane Frances*, on 9 January 1846. Ewing was chaplain of St John's Church of England and the Queen's Orphan Schools at New Town, but had been dismissed as headmaster of the Orphan Schools in 1841, following a scandal involving a teenage girl under his protection. AOT CUS36/1/297; A.J. Hagger, 'Ewing, Thomas James (1813?-1882)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/ewing-thomas-james-2031/text2505>> accessed 10 August 2011.

¹⁴⁵ Maria Pedder to Jane Clark, 8 June [1847], RS8/F44. Editorial emphasis.

¹⁴⁶ Maria Pedder to Jane Clark, 8 June [1847], RS8/F44.

¹⁴⁷ 'Master Pedder' arrived from London aboard the *Tasmania*, 28 January 1848. AOT MB2/39/1/10, p. 41.

¹⁴⁸ Register of Admissions to the Hutchins School, AOT NS36/1/1, reel Z2233. For Pedder's role in the foundation of Hutchins in 1846, see Chapter 4.2.

¹⁴⁹ T.H. Forster to Rev George Fyler Townsend, 24 February 1849, in *An Account of a Voyage in a Convict Ship, with Notes of the First Itinerating Missionary in Tasmania* (London, The Society for the Propagation of the Gospel, 1847), Project Canterbury, Church in the Colonies, No. XXIII, <<http://anglicanhistory.org/aus/spg23.html>> accessed 2 September 2009.

¹⁵⁰ *Courier*, 28 December 1853, p. 3; 26 December 1854, p. 2.

Pedder's emotional and financial investment in his brother's children continued until his death in 1859. In poor health and in mourning for Maria, who had died only a few months earlier, he departed for England in February 1856. It was understood publicly that Pedder's 'late domestic bereavement' and 'continued indisposition' compelled him to 'seek a change of climate'.¹⁵¹ Indeed, as family friend, Mrs Weston, wrote at the time of Maria's death, 'The death of Lady Pedder though an event [to be] expected must be a severe shock to her husband in his infirm state of health'.¹⁵²

Privately, additional family concerns dictated the timing of Pedder's return to England, and it was a family party that boarded the *Wellington* on 4 February.¹⁵³ The widowed Pedder travelled with William Lewes, Jane Nunn, her husband Loftus, and their two young children.¹⁵⁴ In his late teens, William Lewes was ready to attend university,¹⁵⁵ and Captain Nunn's regiment had recently been recalled to Britain.¹⁵⁶ After an absence from England of more than thirty years, Pedder also looked forward to being reunited with his sister, Jane.

¹⁵¹ *Courier*, 6 February 1856, p. 2.

¹⁵² Mrs Weston to [her sister] Jane Clark, 1 November 1855, RS8/F7.

¹⁵³ *Colonial Times*, 4 February 1856, p. 4; 6 February 1856, p. 2.

¹⁵⁴ Pedder sailed with 'Wm. Pedder, Esq., [...] Mr and Mrs Nunn, two children, and servant'. In April, the ship was 'obliged to put in to Pernambuco [in Brazil], for want of water'. Pedder, his nephew, and the Nunns later joined fellow passengers in publicly thanking the ship's captain for his 'uniform kindness, attention and gentlemanly conduct' during the 'somewhat protracted voyage'. *Colonial Times*, 2 February 1856, p. 2; *The Times*, 18 June 1856, p. 1; *Hobart Mercury*, 15 September 1856, p. 3; *Courier*, 22 August 1856, p. 3.

¹⁵⁵ William Lewes matriculated at Exeter College, Oxford, in 1856, but did not complete a degree. Forster, *Alumni Oxonienses*, p. 1088.

¹⁵⁶ The 99th Regiment was garrisoned in Van Diemen's Land, 1848-1856. For their departure from Hobart Town, see *Colonial Times*, 10 January 1856, p. 2.



Figure 7: Jane Pedder, c. 1860.
Carte-de-visite from the studio of Hennah & Kent, Brighton¹⁵⁷

Pedder returned to England only three years before his death, and made his final home at Brighton. Still suffering from the 'Disease of the Nervous System' which had left him partially paralysed after a stroke in 1854, he joined other 'fashionable' invalids at the resort town.¹⁵⁸ Strong family associations also drew him to the Sussex coast. Brighton had been the location of Pedder's marriage to Maria, the home of his mother and other maternal relations, and it remained the home of his unmarried sister.¹⁵⁹

¹⁵⁷ R. Cosens (ed.), *Photographers of Great Britain and Northern Ireland, 1840-1940*, <<http://www.cartedevsite.co.uk/>> accessed 6 May 2010. My thanks to Ron Cosens for supplying this high-quality digital reproduction. The image is not available online.

¹⁵⁸ Certified copy of an entry of death, John Lewes Pedder, 24 March 1859, General Register Office March Quarter 1859, Brighton, vol. 2b, p. 179, no. 116; A. Dale, *Fashionable Brighton, 1820-1860* (Newcastle-upon-Tyne, Oriel Press, 1967), p. 40.

¹⁵⁹ Jane Pedder lived at 4, Western Cottages, near Bedford Square, and also owned no. 5, which she let to a clergyman. Independently wealthy, Jane derived income from her shares in Phoenix and Pelican, and employed several women servants. After Pedder's death, she lived in 'Nice, in the Kingdom of Italy', and died in London in 1864. Will of Jane Pedder, of 4, Western Cottages, Brighton, Sussex, dated 7 April 1863, proved 19 December 1864, Her Majesty's Court Service; PX26 Share Register Journal, 1854-62, Phoenix Assurance Company, Cambridge University Library Manuscripts Department; *London Gazette*, 13 December 1866, p. 6022; Certified copy of an entry of death, Jane Pedder, 13 November



Figure 8: Pedder's final home at 8, Bedford Square, Brighton.
Photographed by Dr Michael Saxby, 2009

Renting a furnished apartment in Bedford Square, Pedder lived close to Jane, who owned an elegant terrace house nearby. He was also surrounded, for a time, by his young relatives. While the Nunns had relocated to Ireland with the 99th Regiment by early 1859,¹⁶⁰ Jane and Loftus were living in Brighton during 1857 and 1858 with their daughters, Maria and Jessie.¹⁶¹ Their only son (also Loftus) was born in December 1857 and baptised in the town's Chapel Royal in March 1858.¹⁶² At the time of the baptism, the Nunns were

1864, General Register Office December Quarter 1864, St George Hanover Square, vol. 1a, p. 216, no. 106.

¹⁶⁰ By April 1859, Captain Nunn was 'stationed at Cork'. Will of Sir John Lewes Pedder, of 8, Bedford Square, Brighton, Sussex, dated 3 March 1859, proved 13 April 1859, Her Majesty's Courts Service.

¹⁶¹ Daughters, Maria and Jessie, were born in Van Diemen's Land; Catherine, Alice and Yvonne were subsequently born in Ireland, Jersey and Suffolk. *Hobart Town Courier*, 8 December 1852, p. 2; Ancestry.com. *1871 England Census* [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2004, *Census Returns of England and Wales, 1871*, TNA PRO RG10/1146/50, p. 37; *Courier*, 17 March 1858, p. 2; 'England Births and Christenings, 1538-1975', *FamilySearch*, <<https://www.familysearch.org>> accessed 24 April 2011.

¹⁶² Loftus John de Winton Clarkson Nunn was born on 27 December 1857 and baptised at the

living in Montpelier Road, near Bedford Square.¹⁶³ A close and trusting relationship with his nephew-in-law is implied by Pedder's decision to name Captain Nunn as one of the executors of his will of 1859. In a codicil, Pedder also made provision for a loan of up to £1,500 for the 'purchase of a Majority in the Queen's Service', for which Nunn was 'required to give only his personal security by note of hand or bond'.¹⁶⁴ The bulk of his estate was bequeathed to Jane Ann Nunn and William Lewes Pedder, whose identities Pedder confirmed as the 'natural' children of 'my late Brother William'.¹⁶⁵

Conclusions

Reconstructing family relationships provides valuable new perspectives on a man previously understood in terms of his public persona. The narratives of these shared lives illuminate important, but overlooked, aspects of Pedder's personal life and character through his roles as an affectionate husband, brother, and uncle/foster-father. Pedder's marriage to his cousin, Maria Everitt, was a central and enduring relationship which sustained him through a long and onerous official career in Van Diemen's Land. Pedder's correspondence reveals that he regarded his wife as a trusted adviser and confidante. In turn, he supported Maria's philanthropic endeavours, and relied on her as the fulcrum of domestic life. Maria's identification as part of Pedder's social orbit before their marriage in 1823 underscores their shared background and values, and adds weight to friends' assessments that they were a happy and united couple.

The presence in the colony of Captain William Pedder expanded the family circle during the 1830s. Pedder's grief at the sudden death of his brother in 1837 reveals that he felt the ties of family deeply. This affection for William

Chapel Royal, Brighton, on 12 March 1858. 'England Births and Christenings, 1538-1975', *FamilySearch*, <<https://www.familysearch.org>> accessed 24 April 2011.

¹⁶³ East Sussex County Record Office, Brighton Chapel Royal, Parish Registers, Baptisms, PAR 259/1/2/2, 1852-80, Item 12, p. 60, n. 223. FHL British Film 1067103, Genealogical Society of Utah.

¹⁶⁴ Will of Sir John Lewes Pedder, Her Majesty's Courts Service.

¹⁶⁵ Will of Sir John Lewes Pedder. Jane Pedder was the other main beneficiary.

extended to his natural children, born in Hobart Town and Madras to partner, Frances Preddy. John and Maria's informal 'adoption' of their orphaned niece and nephew in 1843 opens a window on their domestic sphere, and on the mores of their community. Tracing these family narratives illuminates how gender, status and morality informed constructions of respectability in the nascent settler colonial society in Van Diemen's Land. From the security of their own respectable status, the Pedders' public acknowledgement of Jane and William Lewes after the death of their mother further emphasises the strong bonds of affection in this close-knit family. It also suggests that they were unwilling to allow the children's rank and social prospects to be undermined by colonial prejudices against (even indirect) connections to convictism via their step-father. The sudden addition of two young children to the Pedders' household is a significant event which cannot be disregarded. As uncle turned foster-father, Pedder made an emotional and financial investment in Jane and William Lewes which lasted until his death.

Identifying these family connections also adds a new dimension to the timing of Pedder's repatriation in retirement. With William Lewes and Captain Nunn (and growing family) travelling to England for educational and professional reasons in 1856, the widowed Pedder had no family links to keep him in Van Diemen's Land. To this push factor was added the prospect of reunion with his sister, Jane. After an absence of nearly thirty-three years, Pedder joined the family party aboard the *Wellington* for the long voyage to England, and made his final home in Brighton – a resort town with strong family associations built up over several generations.

CHAPTER 3

PEDDER IN COLONIAL SOCIETY: JUDGE AND GENTLEMAN

In life writing, Arthur W. Frank reminds us, ‘people are subject to the stories others tell about them’.¹ Many of the stories conventionally told about John Lewes Pedder have been narrowly focussed. As a colonial judge, Pedder’s judicial persona is valorised above all others, and his historical significance is located in the trajectory of his official career. Personal interests and relationships are neglected, and Pedder’s self-conception as a gentleman is regarded as tangential to his capability as a judge.

In his short-format judicial biography, J.M. Bennett successfully rebuts several ‘myths’ which cast Chief Justice Pedder as rancorous, ‘petulant’, ‘haughty and disdainful’.² His focus, however, remains firmly on Pedder’s official persona. Almost all Bennett’s index references to Pedder’s ‘character and personality’ in fact relate to professional demeanour or ideological preference.³ Only on the final pages of his brief study does Bennett engage with Pedder’s private persona.⁴ Here, however, he manifestly ignores his own caution that ‘The legal historian is not permitted the licence of the historical novelist to make assumptions in the absence of sources’.⁵ Relying almost exclusively on a handful of what he pejoratively describes as ‘somewhat sycophantish [*sic*] letters’ to George Arthur, Bennett forms an erroneous and unsupported ‘impression of

¹ A.W. Frank, ‘Moral non-fiction: Life writing and children’s disability’ in P.J. Eakin (ed.), *The Ethics of Life Writing* (New York, Cornell University Press, 2004), p. 178.

² J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), pp. 63-65, citing J.E. Calder, in R. Ely (ed.), *Carrel Inglis Clark: The Supreme Court of Tasmania. Its First Century* (Hobart, University of Tasmania Law Press, 1995), p. 16, n. 34; and R.W. Baker, ‘The early judges in Tasmania’, *Tasmanian Historical Research Association Papers and Proceedings* 8 (4) (1960), p. 75.

³ Bennett, *Sir John Pedder*, p. 140.

⁴ Bennett, *Sir John Pedder*, pp. 111-113.

⁵ Bennett, *Sir John Pedder*, p. xi.

Pedder's private character'.⁶ In doing so, he breathes life into another unsubstantiated myth: that Sir John Pedder's personal life was solitary and austere.

Partially paralysed after his stroke, and in mourning for his wife, Maria, the retired chief justice necessarily retreated from social life during the last eighteen months of his colonial residence. Bennett, however, projects this melancholy phase onto Pedder's life as a whole. Unaware of Pedder's extended family and wide network of acquaintance, he visualises a 'lonely' man, who was 'cold, lacking friends and ... insecure even in the company of such friends as he had'.⁷ Further emphasising the limitations of his sources and his focus on Pedder's public persona, Bennett reports that the judge had 'no private interests or recreations apart from his churchgoing and a few philanthropic commitments'.⁸ In short, he imagines Sir John Pedder as 'the epitome of dullness', a 'humourless' workaholic, who 'derived little enjoyment from his life of unremitting asceticism'.⁹

Published and archival sources reveal a very different picture of Pedder's unofficial life. Conscious of his judicial rank, and bound by the etiquette of his class and the age, Sir John scrupulously observed social distinctions. He was far from isolated and unsociable, however. At the time of his repatriation to England in 1856, for example, the *Courier* regretted that professional prudence had 'obliged' Pedder 'to forego much [*sic*] of the pleasures of society, for which his nature was so well adapted'.¹⁰ Similarly emphasising a genial disposition, correspondence from Pedder's peers indicates that the 'aristocracy' of Hobart

⁶ Bennett, *Sir John Pedder*, pp. x-xi. Bennett's other main source is editorial commentary in the colonial press, which he accepts somewhat uncritically.

⁷ Bennett, *Sir John Pedder*, pp. 112-113. Bennett assumes the judge had 'only his wife to support'.

⁸ Bennett, *Sir John Pedder*, pp. 112, 113, 135, n. 61.

⁹ Bennett, *Sir John Pedder*, p. 113.

¹⁰ *Courier*, 5 February 1856, p. 2.

Town warmed to a 'very friendly' and 'agreeable man', who had 'a great idea of comfort, and live[d] in very good style'.¹¹ An engaging manner and enquiring mind are further conjured in Bishop Nixon's observation that, after a friendship of twelve years, he 'hardly knew in which way to allude to [Pedder], whether as the upright judge, the courteous gentleman, the liberal friend, or the accomplished scholar'.¹²

In light of these competing characterisations, chapters 3 and 4 set out to identify Pedder's 'multiple subjectivities' within the settler community of Van Diemen's Land.¹³ Informed by an approach more usually adopted by biographers of non-elite subjects, they demonstrates that the silences around Pedder's private life are only partially arbitrary. The historical record is fragmentary, but many extant traces can be salvaged and reconnected, if one observes Nick Salvatore's exhortation to follow the biographical subject away from the sites of his public life and pursue the archival 'byways wherever they may lead'.¹⁴ 'Not to do this', Salvatore cautions, 'would be to deny to that person and to historical thought the very complexity we as individuals experience daily'.¹⁵

Chapters 3 and 4 cast a wide net in the search for evidence of Pedder's links to individuals and communities of interest beyond the bench. Their underlying framework is informed by Kirsten McKenzie's trans-colonial study of *Scandal in*

¹¹ Ellen Viveash to [her mother] Mrs Tanner, 26 January 1834, in P. Statham (ed.), *The Tanner Letters: A Pioneer Saga of Swan River and Tasmania, 1831-1845* (Nedlands, University of Western Australia Press, 1981), p. 76; Anna Maria Nixon to Echo, 21 July 1843 and 23 August 1843, in N. Nixon (ed.), *The Pioneer Bishop in Van Diemen's Land, 1843-1863: Letters and Memories of Francis Russell Nixon, D.D., First Bishop of Tasmania* (Hobart, J. Walsh & Sons, 1953), pp. 9, 11.

¹² *Colonial Times*, 13 July 1855, p. 3.

¹³ The term is borrowed from K. Harman, 'Multiple subjectivities: Writing Duall's life as social biography' in P. Read, F. Peters-Little and A. Haebich (eds.), *Indigenous Biography and Autobiography* (Canberra, ANU ePress, 2008), pp. 47-56.

¹⁴ N. Salvatore, 'Biography and social history: An intimate relationship', *Labour History* 87 (2004), p. 190.

¹⁵ Salvatore, 'Biography and social history', pp. 190-191.

the Colonies, which identifies three factors ‘central to the construction of status’ in contemporary British settler societies: acquaintance, reputation, and material culture.¹⁶ Where McKenzie focuses on the ambiguities of status in the colonial space, Pedder’s unusually stable personal and professional standing provides a ‘benchmark’ against which contemporaries could measure respectability. By identifying and elucidating the nuances of Pedder’s high standing in Van Diemen’s Land through McKenzie’s three prisms, new and meaningful layers can be added to historically sensitive readings of his life.

In the fluid settler society of Van Diemen’s Land, asserting and interpreting status was a source of anxiety for many free colonists. Ever mindful of his own high rank as judge and gentleman, Pedder was careful to differentiate between professional and personal relationships: some colleagues became close friends; others were excluded from his intimate circle. Through specific episodes and individuals, section 3.1 traces these practices of inclusion and exclusion, and charts examples of Pedder’s social engagement. Challenging his portrayal as aloof from colonial society, this section also illuminates the breadth of Pedder’s acquaintance and his warm hospitality, while section 3.2 explores his strong attachment to particular friends and families.

3.1 Drawing boundaries: circles of colonial acquaintance

During the three decades of Pedder’s official career as chief justice, settler society in Van Diemen’s Land was governed by a small elite, comprising members of the civil and military establishments. At the same time, an increasing number of free colonists with social or political ambition sought to distinguish themselves from the larger convict and emancipist populations. Many trans-colonial visitors were initially struck by the familiar English appearance of Hobart Town. Arriving from India in 1827, for example, surveyor

¹⁶ K. McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne, Melbourne University Press, 2004), p. 47.

George Frankland wrote that he had 'never been in any foreign country where so few foreign objects meet one's eye as in this Colony. It is purely English in every respect excepting the Wood fires'.¹⁷ Travelling from India two years later, his friend, Elizabeth Fenton, perceived 'an indefinable "English air"' as she sailed into 'Hobarton' in 1829.¹⁸ The 'Englishness' of Hobart Town and its environs masked an unfamiliar social landscape, however; for, while the traditional hierarchies of preindustrial England were partially replicated in colonial society,¹⁹ distance from original circles of acquaintance helped to generate a sense of anonymity which both facilitated reinvention and confused conventional boundaries of social status.²⁰ Among the free and emancipist settler population, this ambiguity intensified anxieties about maintaining personal status and interpreting that of others.

As chief justice, Pedder's office shielded him from the 'status anxiety' experienced by many of his contemporaries: it simultaneously defined his social identity and granted him membership of the colonial elite. Under the Charter of Justice of 1823, the Chief Justice of Van Diemen's Land was accorded 'rank and precedence above and before all our Subjects whomsoever within the Island of Van Diemen's Land', with the exception of the governor and 'all such persons as, by law or usage, take place in England before our Chief Justice of the Court of

¹⁷ Frankland to Hay, 15 August 1827, in G. Frankland, *Five Letters from George Frankland in Van Diemen's Land, Privately Addressed to R.W. Hay of the Colonial Office* (Adelaide, Sullivan's Cove, 1997), p. 9. Formerly Surveyor-General at Poona, Frankland was an accomplished amateur artist and architect. P.R. Eldershaw, 'Frankland, George (1800-1838)', *Australian Dictionary of Biography*, National Centre for Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010378b.htm>> accessed 23 August 2010.

¹⁸ E.K. Fenton, *The Journal of Mrs Fenton: A Narrative of Her Life in India, the Isle of France (Mauritius) and Tasmania during the Years 1826-1830* (London, E. Arnold, 1901), p. 341.

¹⁹ James Boyce argues that the large middling ranks of the 'English social pyramid' were not replicated in the colony. J. Boyce, *Van Diemen's Land* (Melbourne, Black Inc., 2008), p. 177.

²⁰ McKenzie, *Scandal in the Colonies*, pp. 4-7, 12-14; P. Russell, 'A Wish of Distinction': *Colonial Gentility and Femininity* (Melbourne, Melbourne University Press, 1994), pp. 6, 10-11; K.M. Reid, *Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Manchester, Manchester University Press, 2007), p. 74.

King's Bench'.²¹ At most times, then, during his official career, Chief Justice Pedder was second only to the Lieutenant-Governor of Van Diemen's Land in matters of precedence. As Governor Sir William Denison observed in the 1840s, precedence remained 'a matter of considerable importance' in the colony; his memoir records that a 'story was in vogue ... of a dispute on the subject ... so inveterate that it could only be settled with reference to England, and a direct and authoritative decision on the matter by the Secretary of State!'²² With his elevation to the imperial honour of knighthood in 1838, Sir John Pedder's eminence within the colony's social and professional hierarchy was further emphasised and secured.²³

When Pedder returned to England in 1856, the *Courier* recalled that, as chief justice, he had 'zealously guarded his own station, and denied himself much of social intercourse, from the danger incidental to bringing the judicial office into frequent contact with the turmoil of a newly planted colony'.²⁴ Reassessing the career of Pedder's 'eccentric' colleague, Puisne Judge Algernon Sidney Montagu,²⁵ Stefan Petrow also identifies the link between social detachment and judicial independence.²⁶ During a libel case in 1841, for example, Mr Justice

²¹ Warrant of the Charter of Justice, *HRA* III, IV, p. 479.

²² R. Davis and S. Petrow (eds.), *Varieties of Vice-Regal Life (Van Diemen's Land Section) by Sir William and Lady Denison* (Hobart, Tasmanian Historical Research Association, 2004), p. 47, n. 37 (Denison's footnote). Denison served as Governor Van Diemen's Land, 1847-1854.

²³ Pedder's knighthood, conferred by Letters Patent, was gazetted on 27 November 1838 and reported in the colonial press the following year. *London Gazette*, 27 November 1838, p. 2715; *Sydney Gazette*, 12 March 1839, p. 3; *Colonial Times*, 26 March 1839, p. 7. Some of its political implications are explored in Chapter 5.

²⁴ *Courier*, 5 February 1856, p. 2.

²⁵ P.A. Howell, 'Montagu, Algernon Sidney (1802-1880)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/montagu-algernon-sidney-2470/text3311>> accessed 31 October 2011.

²⁶ S. Petrow, 'Moving in an "eccentric orbit": The independence of Judge Algernon Sidney Montagu in Van Diemen's Land, 1833-47' in H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008), p. 157.

Montagu was outraged when the *Courier* 'dragged' his name 'before the public'.²⁷ 'No man', he railed from the bench, 'can have endeavoured more than I have done to avoid mixing in party or individual quarrels: I have lived like a hermit in Van Diemen's Land'.²⁸ This seclusion, however, could be taken too far. 'If Mr Montagu had thought proper to mingle with more sociality amongst the society of our capital', the *Colonial Times* advised in 1843,

he would have discovered that, while some of those who dwell in high places are indeed deserving of his contempt, there are others whose friendship would be valuable, and whose esteem would be both desirable and complimentary; but now his Honor [*sic*] regards everyone with a feeling of impatient irritability, indicative of his own personal scorn towards the colonial race.²⁹

No such criticism was levelled at Pedder. Punctiliousness and professional prudence nevertheless informed his desire to maintain a degree of detachment, as illustrated by an officially documented dispute between the chief justice and the Sheriff of Van Diemen's Land, in 1830-1831.

After five years as sheriff, Dudley Fereday complained to the Colonial Office of 'social neglect' and 'personal slights' from Chief Justice Pedder and Governor Arthur, and sought a transfer to another colony.³⁰ Writing to Arthur in May 1830, Fereday further complained of Pedder's conduct; eight months later, Pedder responded officially, albeit reluctantly, to Fereday's three charges:

1st That my conduct towards him has been marked by evident dislike & entire neglect.

2nd That on a particular occasion which he mentions, I betrayed so much vehemence of manner that he felt it right to leave the room in

²⁷ *Courier*, 11 June 1841, p. 2.

²⁸ *Hobart Town Courier*, 11 June 1841, p. 2; Petrow, 'Moving in an "eccentric orbit"', p. 159.

²⁹ *Colonial Times*, 2 May 1843, p. 2; Petrow, 'Moving in an "eccentric orbit"', p. 157. The professional relationship between Pedder and Montagu was also discordant.

³⁰ P. Chapman (ed.), *The Diaries and Letters of G.T.W.B. Boyes: Volume I, 1820-1832* (Melbourne, Oxford University Press, 1985), p. 320, n. 22; [no author], 'Fereday, Dudley (1789?-1849)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010353b.htm>> accessed 23 August 2010.

which we were, under a strong feeling of having been very ill treated.

3rd That I have lately resumed my unpleasant manner of speaking to him.³¹

Pedder's correspondence indicates that he was at a loss to understand Fereday's grievances, 'as he did not complain of any act of rudeness or incivility on my part'.³² Instead, the 'whole matter of his complaints appeared to be that I did not visit or associate with him'.³³ Pedder maintained that he had 'never treated [Fereday] in his office with the slightest disrespect or withheld from him any support to which as an officer of the Court he was entitled'.³⁴ He was nonetheless clear that he had 'been generally careful not to enter, or be led into conversation with him upon subjects unconnected with our relative official duties'.³⁵

Pedder's impatience with Fereday's unwillingness to respect the boundaries of their professional relationship is revealed in his recollection that

once or twice at a former period, when much public dissension prevailed, upon Mr Fereday's taking occasion to speak to me of the conduct and character of some persons who were then distinguished by the part they took in those dissensions, I was obliged to decline the conversation in so decided a manner as might leave no doubt in Mr Fereday's mind that it was my determined purpose to do so.³⁶

Increasingly vexed, Pedder was drawn into a 'Fracas' with Fereday in May 1830.³⁷ Colonial diarist, George Boyes, recorded that a quarrel erupted between the two men 'in consequence of F.'s writing home to his friend Lyttleton M.P. in complaint of his treatment by the Lieut. Governor and the Judge'.³⁸ It was one of

³¹ Pedder to Arthur, 1 January 1831, AOT G039/1/1, f. 198. Fereday's letter is not extant.

³² Pedder to Arthur, 1 January 1831, G039/1/1, f. 201.

³³ Pedder to Arthur, 1 January 1831, G039/1/1, f. 201.

³⁴ Pedder to Arthur, 1 January 1831, G039/1/1, f. 200.

³⁵ Pedder to Arthur, 1 January 1831, G039/1/1, f. 199.

³⁶ Pedder to Arthur, 1 January 1831, G039/1/1, f. 199.

³⁷ Diary of George Boyes, 3 May 1830, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, p. 320.

³⁸ Diary of George Boyes, 3 May 1830, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, p. 320, and see n. 22.

several conversations during which Pedder expressed his frustration with 'some warmth of manner'.³⁹ Pedder conceded that Fereday had

continued so long and so pertinaciously [*sic*] to enquire what were my reasons for the conduct which I observed towards him, that after having in vain endeavoured to make him perceive the very awkward situation in which a perseverance in his enquiries placed us I did at last lose my patience.⁴⁰

In his defence, Pedder assured Arthur that the 'vehemence into which Mr Fereday says I was betrayed was not greater than that which any *gentleman* in similar circumstances would feel obliged to make use of, in order to repel an attempt to force him to an explanation which he is not bound to give'.⁴¹

Pedder was evidently perplexed by Arthur's request for his 'observations upon Mr Fereday's letter' of 3 May 1830, remarking that 'I can hardly persuade myself that Mr Fereday can mean to complain of me because I have not confided to him my opinion ... or because I have avoided his society'; neither could he conceive that Arthur or the Secretary of State could 'desire any explanation from me upon such matters of mere private life'.⁴² Indeed, he was 'sorry and almost ashamed to mention in an official communication much of what it contains', but complied in the belief that he 'could not omit any part' of his explanation 'without either disregarding your Ex[cellency's] command or appearing to be desirous of concealing what has really been my conduct towards Mr. F.'. ⁴³ Pedder nonetheless retained his conviction that neither Fereday 'nor any man with whom I have never been on any other terms than such as we were then on, had any right to ask me my reasons for declining his society'.⁴⁴

³⁹ Pedder to Arthur, 1 January 1831, G039/1/1, f. 201.

⁴⁰ Pedder to Arthur, 1 January 1831, G039/1/1, f. 201.

⁴¹ Pedder to Arthur, 1 January 1831, G039/1/1, f. 200. Editorial emphasis.

⁴² Pedder to Arthur, 1 January 1831, G039/1/1, ff. 199-200.

⁴³ Pedder to Arthur, 1 January 1831, G039/1/1, f. 203.

⁴⁴ Pedder to Arthur, 1 January 1831, G039/1/1, f. 201.

Pedder's firm defence of his own gentlemanly conduct against 'vague' accusations of neglect points to the 'lines of demarcation' which characterised the stratified societies of the British world.⁴⁵ As Pedder confirmed to Arthur, it was 'partly from dissimilarity in our habits of life and thinking, and partly from motives of prudence, [that] I have avoided all intimacy and association with Mr Fereday ever since I first knew him'.⁴⁶ While Fereday was known to be the son of 'a common collier', the 'habits of life and thinking' most offensive to Pedder probably concerned the sheriff's side-line as a moneylender, which earned him a reputation as 'the Prince of Usurers'.⁴⁷ In contrast to his willingness to rebuke Fereday, Pedder was reticent to reprimand a social equal. During an inquiry into the disrespectful conduct of the attorney-general, Alfred Stephen, in 1836, Pedder told Stephen that 'I have often been on the point of speaking to you on the subject, but it is unpleasant to one's feelings to be telling a *Gentleman* in private that he does not treat you with the proper respect'.⁴⁸

Professional prudence did not isolate Pedder entirely from colonial society. His interactions were, however, clearly influenced by practical constraints. Having undertaken 'a Tour of Inspection through several of the Agricultural Settlements' with Governor Arthur in 1825, for example, Pedder wrote of his surprise that 'in the country, the number of respectable Settlers is so much smaller than I expected to find it'.⁴⁹ Six years later, having 'scarcely ever quitted [Hobart Town] but to make hasty journeys on duty to the other side of the Island', Pedder conceded that he still had 'but little personal acquaintance with the

⁴⁵ Pedder to Arthur, 1 January 1831, G039/1/1, f. 198; McKenzie, *Scandal in the Colonies*, p. 52.

⁴⁶ Pedder to Arthur, 1 January 1831, G039/1/1, f. 198.

⁴⁷ [no author], 'Fereday, Dudley (1789?-1849)', *Australian Dictionary of Biography*; *Colonial Times*, 15 April 1834, p. 6.

⁴⁸ Transcript of Executive Council minutes of meeting, 23 September 1836, CO 280/74, f. 478a, AJCP reel PRO 274; J.M. Bennett, *Lives of the Australian Chief Justices. Sir Alfred Stephen: Third Chief Justice of New South Wales, 1844-1873* (Sydney, The Federation Press, 2009), p. 86. Editorial emphasis.

⁴⁹ *Hobart Town Gazette*, 3 June 1825, p. 2; Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274, AJCP reel PRO 231.

Settlers'.⁵⁰ In Hobart Town itself, 'society' was also comparatively limited. As the patrician George Frankland reported to his patron at the Colonial Office in 1827, he had 'been agreeably surprised in the description of Society' in Hobart Town: 'What there is', he wrote, 'is really very good, but then I should say it is limited to eight or ten families'.⁵¹ Mrs Fenton was similarly surprised that the 'society here is very superior to what I had expected to find', for she had been 'fully prepared to be without any that [she] *could* mingle in'.⁵² Other visitors were perhaps less particular. Visiting artist Augustus Prinsep observed that 'The society of Hobartton is very pleasant, and ... has been very kind; but the chief amusement to strangers is the constitution of this society': most of his 'new friends' had 'sprung from the lowest democracy'.⁵³ Beyond the small number of prominent families enumerated by Frankland, Pedder probably found few social equals in the colony.

As McKenzie illustrates, identifying and cementing acquaintance through formal visiting was central to the 'politics of bourgeois respectability'.⁵⁴ At the 'apex of the visiting pyramid', Government House became the site for forging political and social alliances, amid dinner parties and balls.⁵⁵ In determining whether to admit newcomers to their circle, many respectable inhabitants took their cue from the vice-regal couple. As colonial auditor, George Boyes, wrote to his wife in 1826, the 'Public Officers always wait till the first dinner at Government

⁵⁰ Report of the Committee on Immigration, 4 July 1831, Enclosure 1 in Governor Arthur's Dispatch No. 42, 9 July 1831, CO 280/29, f. 255, AJCP reel PRO 248.

⁵¹ Frankland to Hay, 15 August 1827, in Frankland, *Five Letters*, p. 12. Frankland was the grandson of an English baronet and a Scottish baron. Mrs Fenton observed that Frankland was 'above the common style of men, and a few minutes' conversation convinced me he was equally high-bred and kindly obliging'. Fenton, *Journal of Mrs Fenton*, p. 343.

⁵² Fenton, *Journal of Mrs Fenton*, p. 357. Original emphasis.

⁵³ A. Prinsep, *The Journal of a Voyage from Calcutta to Van Diemen's Land: Comprising a Description of that Colony during a Six Months' Residence, from Original Letters Selected by Mrs. A. Prinsep; and, Illustrations to Prinsep's Journal of a Voyage from Calcutta to Van Diemen's Land from Original Sketches taken during the Years 1829 and 1830* (Hobart, Melanie Publications, 1981; originally published London, Smith, Elder & Co., 1833), p. 117.

⁵⁴ McKenzie, *Scandal in the Colonies*, p. 52.

⁵⁵ McKenzie, *Scandal in the Colonies*, p. 52.

House to see how the new arrival is received before they shew [*sic*] him any neglect or attention'.⁵⁶ At his first appearance, Boyes was 'favoured' with 'a long conversation with His Excellency ... which had a due effect upon the Company', including Chief Justice Pedder: soon after, the 'Judge apologised for not having called'.⁵⁷ A further glimpse of the visiting culture emerges from the correspondence of Anna Maria Nixon, wife of the first Anglican Bishop of Tasmania. As Mrs Nixon related to her family in 1843, 'I have just completed a round of sixty visits with Lady Pedder, everybody high and low having left cards on us'.⁵⁸ Unlike the bishop, however, who 'must not alienate any true friend of the Church', the chief justice could afford to be more particular about who was admitted to his circle.⁵⁹

Among those with whom Pedder did choose to mix were wealthy settlers Charles and Ellen Viveash, who arrived in Hobart Town 1834 and took up temporary residence at the Macquarie Hotel, near the Pedder's home in Macquarie Street.⁶⁰ Maria Pedder called on Mrs Viveash several times after their arrival, only to find that Ellen was too ill to receive her. Having recovered her health, Ellen and Charles joined the Pedders for dinner 'the next week'.⁶¹ In a striking contrast to Bennett's construction of Pedder as cold and dull, Mrs Viveash reported enthusiastically of this first evening with the Pedders: 'What delightful people they are, pleasant, gentile [*sic*], well-informed, clever and good'.⁶²

⁵⁶ Boyes to Mary Boyes, 9 November 1826, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, p. 266.

⁵⁷ Boyes to Mary Boyes, 9 November 1826, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, p. 266.

⁵⁸ Anna Maria Nixon to Echo, 23 August 1843, in Nixon, *The Pioneer Bishop*, p. 11.

⁵⁹ Anna Maria Nixon to Echo, 23 August 1843, in Nixon, *The Pioneer Bishop*, pp. 11-12.

⁶⁰ Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner Letters*, p. 73. In the 1820s, the Macquarie Hotel advertised 'Genteel and commodious accommodation' for 'Gentlemen and Private Families'. G. Corney, *Macquarie House Conservation Management Plan*, 23 June 2008, p. 6, <<http://www.stors.tas.gov.au/au-7-0095-00610>> accessed 21 July 2009.

⁶¹ Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner Letters*, p. 73.

⁶² Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner Letters*, p. 73.

Others friends who 'began their colonial life' with the Pedders included colleagues from the civil and military establishments,⁶³ such as Registrar of the Supreme Court, William Sorell.⁶⁴ During the two years in which he kept a journal, Sorell regularly recorded lunching or dining with the Pedders,⁶⁵ while he occasionally 'breakfasted with the Chief Justice at business'.⁶⁶ The young official frequently called on Mrs Pedder or the judge, or went walking with the couple.⁶⁷ Other leisure activities included going 'out shooting' with Pedder and some of the military officers.⁶⁸ Although Sorell's journal records for the last time in July 1825 that he 'Dined with His Honor [*sic*] the Chief Justice and Capt. and Mrs Lockyer etc', the pair remained friends.⁶⁹ Thirty years later, when Sorell was acting as administrator of his late brother's estate, Pedder thanked Sorell 'for all you have done for me'.⁷⁰

John Helder Wedge was another colonial friend of many years standing.

⁶³ The phrase comes from a letter from family friend, Mrs Weston, writing to her sister, Jane Clark, on the death of Lady Pedder and the 'loss of so many old friends'. As Mrs Weston observed, 'How few indeed are now left who began their colonial life with us.' Mrs Weston to Jane Clark, 1 November 1855, RS8/F7.

⁶⁴ The eldest son of the former Lieutenant-Governor of Van Diemen's Land, William Sorell junior arrived in Hobart Town in 1823, and was appointed Registrar of the Supreme Court following the sudden death of Edward Butler. He held various public offices until his death in 1860. R.M.H. Garvie, 'Sorell, William (1800-1860)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020425b.htm>> accessed 22 September 2010; Arthur to Bathurst, 12 June 1824, *HRA* III, IV, pp. 157-158; Journal of William Sorell, 1 August 1823-12 August 1825, Transcript by L. Rodda and P.S. King, S17/2 University of Tasmania Special Collections (hereafter Journal of William Sorell (transcript)), 8 and 10 May 1824, p. 30.

⁶⁵ Sorell records sharing a meal with Pedder and/or his wife on at least twenty-one occasions between July 1824 and July 1825. Journal of William Sorell (transcript), 7 July 1824, p. 35; 14 July 1824, p. 36; 22 July 1824, p. 36; 7 August 1824, p. 36; 26 August 1824, p. 39; 30 August 1824, p. 40; 11 September 1824, p. 40; 16 September 1824, p. 41; 21 September 1824, p. 41; 22 October 1824, p. 44; 25 October 1824, p. 44; 13 November 1824, p. 47; 23 December 1824, p. 53; 25 January 1825, p. 59; 10 February 1825, p. 61; 28 February 1825, p. 64; 1 April 1825, p. 68; 27 April 1825, p. 75; 24 June 1825, p. 81; 25 June 1825, p. 81; and 10 July 1825, p. 82.

⁶⁶ Journal of William Sorell (transcript), 22 July 1824, p. 36.

⁶⁷ Journal of William Sorell (transcript), 1 December 1824, p. 50; 16 April 1825, p. 72; 6 June 1825, p. 79; and 12 June 1825, p. 80.

⁶⁸ Journal of William Sorell (transcript), 19 June 1824, p. 34.

⁶⁹ Journal of William Sorell (transcript), 10 July 1825, p. 82.

⁷⁰ Pedder to Sorell, 15 November 1855. Accounts, letters and associated papers used by Sorell in the administration of the estate of Captain William Pedder, AOT NS363/1/2.

Pedder's exact contemporary, Wedge arrived in Van Diemen's Land in April 1824, to take up appointment as second Assistant Surveyor.⁷¹ Mutual friend Anna Maria Nixon remarked in 1843 that, 'Although not a polished man, [Wedge] has a fund of information and a pleasant, open, frank manner, which at once puts him on an easy footing'.⁷² Another 'intimate friend' believed Wedge to be 'a high minded honourable gentleman, who never thought a mean thought, and was incapable of doing a dirty action'.⁷³ In 1856, Wedge publicly acknowledged he 'had long entertained the most sincere and unreserved friendship with the late Chief Justice Sir John Pedder, whom he had intimately known, for the last thirty-two years'.⁷⁴ The intimacy of their friendship is illustrated by the fact that, when Wedge married Maria Medland Wills at St David's Cathedral in 1843, it was Pedder who gave away the bride.⁷⁵ The Pedders later joined the 'select party of friends and relations of the bridegroom and bride', who 'partook of a handsome collation at the Bishop's house'.⁷⁶

Like Sorell, Wedge recorded social interactions with the Pedders in succinct journal entries. His field work with the Survey Department often involved long absences from Hobart Town, but he regularly visited the Pedders on his return. On 31 December 1826, for example, having spent the 'Morn : & Eve' at church, Wedge recorded dining 'with Mr Pedder'; on 'Xmas day' 1827, he 'dined with Mr & Mrs Pedder solus'.⁷⁷ A lacuna in Wedge's journal in early 1835 coincides

⁷¹ A.G.L. Shaw, 'Wedge, John Helder (1793–1872)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004, <<http://www.oxforddnb.com/view/article/28964>> accessed 27 September 2010; Bathurst to Arthur, 1 October 1823, *HRA* III, IV, p. 88; *Hobart Town Gazette*, 16 April 1824, p. 2.

⁷² Anna Maria Nixon to Echo, 10 July 1843, in Nixon, *The Pioneer Bishop*, p. 6.

⁷³ *Mercury*, 29 November 1872, p. 3. An obituary supplied by J.E. Calder, Wedge's former colleague at the Survey Department, quotes an unnamed 'intimate friend'.

⁷⁴ *Courier*, 19 December 1856, p. 2. Wedge's comments were made during a Legislative Council debate on 'a Judge of the Supreme Court becoming President of the Legislative Council'.

⁷⁵ Maria Medland Wills travelled to Van Diemen's Land with Bishop and Mrs Nixon as their children's governess. Her marriage to Wedge was the first performed by the new bishop. Anna Maria Nixon to Echo, 10 July 1843, and 2 January 1844, in Nixon, *The Pioneer Bishop*, pp. 6, 16.

⁷⁶ *Courier*, 5 January 1844, p. 2.

⁷⁷ G.H. Crawford, W.F. Ellis and G.H. Stancombe (eds.), *The Diaries of John Helder Wedge*,

with an expedition to find the source of the River Derwent.⁷⁸ Surveyor-General Frankland later reported to the Colonial Office that Wedge's party 'reached two beautiful lakes ... lying in the heart of the most romantic Scenery and ... surrounded by lofty mountains'.⁷⁹ These he named Lakes Pedder and Maria, in honour of his friends.⁸⁰

In addition to entertaining *en famille* with new colonial friends like Sorell and Wedge, John and Maria Pedder hosted a range of private and semi-official entertainments. In April 1828, for example, the colonial press reported that, 'Chief Justice Pedder gave a handsome ball and supper to a large party'.⁸¹ The following year, Henry Savery's *The Hermit in Van Diemen's Land* imagined a similar ball at the Pedders' Macquarie Street residence.⁸² Originally published in the *Colonial Times* as a series of satirical sketches 'on the state of manners and society', *The Hermit* provoked hostile reactions from many of those it parodied.⁸³ A contemporary key to *The Hermit* identifies individuals mentioned in the text, many of whom are known to have been Pedder's colleagues and friends.⁸⁴

1824-1835 (Hobart, Royal Society of Tasmania, 1962), pp. 33, 41.

⁷⁸ Crawford, Ellis and Stancombe, *Diaries of John Helder Wedge*, p. 76.

⁷⁹ G. Frankland, 'Narrative of Mr Frankland's expedition to the head of the Derwent and to the Countries bordering the Huon', enclosure in Frankland to Hay, 21 October 1835, CO 281/61, f. 50, AJCP reel PRO 266.

⁸⁰ A river and a mountain were also named for Pedder. See Crawford, Ellis and Stancombe, *Diaries of John Helder Wedge*, pp. 46, 47, 48, 49 and 60.

⁸¹ *Australian*, 18 April 1828, p. 4; Bennett, *Sir John Pedder*, p. 117, n. 8.

⁸² Savery's thirty 'sketches of life and characters in Hobart and the countryside' were published in the *Colonial Times* between 5 June and 25 December 1829 under the pseudonym Simon Stukeley. C. Hadgraft and M. Roe (eds.), Henry Savery, *The Hermit in Van Diemen's Land* (St Lucia, University of Queensland Press, 1964), p. 28.

⁸³ Savery, 'Author's preface', *The Hermit in Van Diemen's Land*, p. 45. When *The Hermit* essays were published in a single volume in 1830, several libel actions against the publisher came before Chief Justice Pedder in the Supreme Court. Hadgraft and Roe, 'Biographical introduction' in Savery, *The Hermit in Van Diemen's Land*, p. 29.

⁸⁴ The Mitchell Library copy of *The Hermit* contains an 'apparently contemporary' key to persons mentioned in the text. In a recent study, Heather Gaunt points to the existence of a number of extant keys, which are not 'exactly alike'. Hadgraft and Roe, 'The key to persons' in Savery, *The Hermit in Van Diemen's Land*, p. 185; H. Gaunt, 'History and memory in the Tasmanian Public Library: The curious case of *The Hermit in Van Diemen's Land*', *History Australia* 6 (1) (2009), p. 10.4. See also M. Roe, 'Henry Savery's "The Hermit in Van Diemen's Land": A supplementary note', *Tasmanian Historical Research Association Papers and Proceedings* 44 (2) (1997), p. 91.

Savery's sketch thus provides a lively, if imaginary, insight into the society in which the chief justice could safely, and enjoyably, mix.

The fictive party described by *The Hermit* was 'large and well selected, containing a fair proportion of the useful and ornamental members of community – of talkers and listeners, of those who amused and who were amused – of all that is charming, young, and gay; and of that which is sensible, mature, and grave'.⁸⁵ 'Among the persons in the room', Savery imagined 'a tall Gentleman, and a Lady' – identified in the key as Major and Mrs Oakes – 'who appeared quite at home'.⁸⁶ Like many in Pedder's circle, Oakes was a military officer who had formerly served in India.⁸⁷ Other guests included the Solicitor-General, Alfred Stephen,⁸⁸ and 'a singularly dandified young man', 'probably' his younger brother, George Milner Stephen, who later became a clerk of the Supreme Court.⁸⁹ Surveyor, Captain Edward Dumaesq, and his wife Frances were also present,⁹⁰ as was family friend, Major Sholto Douglas,⁹¹ and colonial official, Captain John Montagu.⁹²

⁸⁵ Savery, *The Hermit in Van Diemen's Land*, p. 77.

⁸⁶ Savery, *The Hermit in Van Diemen's Land*, pp. 74-75, 198-199.

⁸⁷ Formerly an officer of the East India Company, Henry Robert Oakes arrived in Van Diemen's Land in April 1824 with '3500£' in 'Stock, Money and other valuables', and received substantial land grants. Oakes to Arthur, 20 April 1824, AOT CS01/1/80/1798, ff. 178-179.

⁸⁸ Savery, *The Hermit in Van Diemen's Land*, pp. 76, 195.

⁸⁹ Savery, *The Hermit in Van Diemen's Land*, pp. 75, 199.

⁹⁰ Savery, *The Hermit in Van Diemen's Land*, pp. 75, 199-200. Dumaesq was a brother-in-law of Governor Darling of New South Wales, and served as acting Surveyor-General of Van Diemen's Land, 1825-1828. R. Page, 'Dumaesq, Edward (1802-1906)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010316b.htm>> accessed 19 October 2010.

⁹¹ Savery, *The Hermit in Van Diemen's Land*, pp. 76, 200. Douglas served in the 63rd Regiment, and was named as an executor of William Pedder's will. J.F. McMahon, 'Douglas, Sholto (1795-1838)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/AS10133b.htm>> accessed 23 August 2010; Will of William Pedder, Captain in His Majesty's Sixty Third Regiment of Foot of Hobart Town, Van Diemen's Land, 26 December 1833, AOT AD961/1/2, Will No. 166 (1843); TNA PROB 11/1992.

⁹² Savery, *The Hermit in Van Diemen's Land*, pp. 76, 195. Montagu served in various capacities in the civil establishment of Van Diemen's Land, and was a key member of the Arthur 'faction'. J. Reynolds, 'Montagu, John (1797-1853)', *Australian Dictionary of Biography*, National Centre of

Far from portraying a dull and formal atmosphere,⁹³ Savery's vignette characterises the Pedders as fashionable and good humoured. Describing his fictional arrival at their 'large' and 'commodious looking' Macquarie Street residence, *The Hermit* relates that, 'Upon the announcement of my name, I looked about me to catch the eye of the Lady to whom I was to make my bow, and presently observed one whom it was not possible to mistake for any other than the mistress of ceremonies'.⁹⁴ Mrs Pedder is characterised as 'perfectly at ease in her deportment, returning, or rather anticipating my bow, with a peculiarly graceful and elegant curtesy [*sic*]'.⁹⁵ Dressed in 'a Tyrian blue gauze dress, made very fashionably ... her head was ornamented by a pretty and very becoming *capote* [cap-like hat], made of silk with corresponding etceteras'.⁹⁶

In an imagined exchange, during which the Pedders' guests decry the 'abominable remarks' of *The Hermit's* mysterious author, Savery has John and Maria Pedder participating with good humour in speculation about the identity of 'this Hermit ... who takes such liberties with all the people':

'Yes indeed, I'm sure he's taken much greater latitude in speaking of my husband, than I would have dared to use myself,' said the Lady of the house. 'I'd give anything to know who he is,' 'and so would I, too, my dear,' replied a tall thin Gentleman, holding a handsome snuff box in his hand, 'for I might then have my doubts removed as to the best way of managing you Ladies, which with all my experience I confess I have not yet acquired'.⁹⁷

As Heather Gaunt demonstrates, the 'encoded satire' of *The Hermit* embodies a 'familiar trope [of] reading as game playing', in which readers are offered

Biography, Australian National University,
<http://www.adb.online.anu.edu.au/biogs/A020214b.htm> accessed 19 October 2010.

⁹³ cf. Bennett, *Sir John Pedder*, p. 16, which blends references in *The Hermit* to this fictive party and another at Government House.

⁹⁴ Savery, *The Hermit in Van Diemen's Land*, p. 74.

⁹⁵ Savery, *The Hermit in Van Diemen's Land*, p. 74.

⁹⁶ Savery, *The Hermit in Van Diemen's Land*, p. 74.

⁹⁷ Savery, *The Hermit in Van Diemen's Land*, p. 75.

‘decoding opportunities’.⁹⁸ Referencing Pedder’s ‘inveterate habit of snuff-taking’,⁹⁹ *The Hermit* clearly signals the identity of the ‘tall thin Gentleman’ with the ‘handsome snuff box’, while Maria Pedder becomes ‘Mrs Doubtmuch’ – an allusion to her husband’s reputation for ‘judicial hesitancy’.¹⁰⁰ Just as many contemporary readers in Hobart Town would have engaged in ‘a communal reading experience through consultation on character identification’,¹⁰¹ *The Hermit* also self-referentially portrays the thinly disguised subjects of its parody playing a similar game among themselves in this fictive scene at the Pedders’ home.

The Pedders’ hospitality was also extended to more transient visitors to the island, including French explorers and the officers of the various British regiments garrisoned in Van Diemen’s Land. Writing in the early 1840s, colonial commentator, David Burn, observed that, ‘Balls and suppers are very frequent in Hobart Town ... being the approved mode in which the inhabitants manifest their courtesy to the officers of British and foreign ships of war visiting the port’.¹⁰² As McKenzie highlights in the case of contemporary Sydney, it was also a means by which colonists enhanced their own standing in ‘competitions of status’.¹⁰³ In a published account of his voyages to the South Seas, French

⁹⁸ Gaunt, ‘History and memory in the Tasmanian Public Library’, p. 10.3.

⁹⁹ Pedder’s penchant for snuff is recorded in several contemporary sources, including an obituary from the *Hobart Town Advertiser* dated 10 June 1859, reprinted in the *Sydney Morning Herald*, 22 June 1859, p. 8. Pedder’s colleague, Alfred Stephen, recalled that in the early 1830s officers of the 63rd Regiment dubbed the chief justice ‘Snuff-box’. Solicitor-General Stephen was nicknamed ‘Chatter-box’, and the ‘irascible’ Attorney-General, Algernon Montagu, was figuratively designated ‘Pepper-box’. Bennett, *Sir Alfred Stephen*, p. 229. In 1827, Pedder thanked Arthur for a ‘present of Snuff’, which was ‘very fine and a great treat’. He also regularly imported cases of snuff. Pedder to Arthur, private, [n.d.] [1827], Papers of Sir George Arthur (hereafter Arthur Papers), vol. 9, ML ZA 2169, reel MAV/FM4/ 3671; *Courier*, 6 April 1841, p. 2; 28 January 1842, p. 2; 16 December 1846, p. 2; and *Colonial Times*, 2 February 1849, p. 2; 11 December 1849, p. 2; 5 December 1854, p. 2; 28 September 1855, p. 2.

¹⁰⁰ Savery, *The Hermit in Van Diemen’s Land*, pp. 73, 74, 198; Bennett, *Sir John Pedder*, p. 16.

¹⁰¹ Gaunt, ‘History and memory in the Tasmanian Public Library’, p. 10.4.

¹⁰² D. Burn, *A Picture of Van Diemen’s Land by David Burn. A Facsimile of a Work Published in ‘The Colonial Magazine’, 1840-41* (Hobart, Cat & Fiddle Press, 1973), p. 115.

¹⁰³ McKenzie, *Scandal in the Colonies*, p. 52.

explorer, Captain Jules Dumont d'Urville, recorded that, when the *Astrolabe* and *Zélée* arrived in Hobart Town in December 1839, he and his companions 'encountered great kindness and received a most flattering welcome'.¹⁰⁴ 'Invitations and entertainments came thick and fast', he noted, as 'all the colony's officials vied with one another to make us forget the hardships we had been through'.¹⁰⁵

Amid this warm hospitality, the chief justice was singled out for particular praise. 'Out of gratitude', Dumont d'Urville wrote, 'it behoves me to make particular mention of Sir John Pedder, with whom I made friends the very first day, and who was to overwhelm me with courtesies for the whole of my stay'.¹⁰⁶ Dumont d'Urville was, in fact, renewing his friendship with Pedder. The two men had first met in 1827, when the French naval officer visited Van Diemen's Land during an expedition to the South Pacific in search of the ill-fated *La Pérouse*. At a garden party at Government House on 20 December 1827, Dumont d'Urville 'particularly noticed' Chief Justice Pedder and the Colonial Secretary, John Burnett, 'for their gracious manner and education'.¹⁰⁷ On Christmas Eve, Dumont d'Urville and Charles-Hector Jacquinot, commander of the *Zélée*, 'dined with M[onsieur] Pedder' and 'spent a very pleasant evening in conversation with the judge'.¹⁰⁸ Dumont d'Urville was evidently impressed by Pedder, whom he described as 'one of the nicest and best educated Englishmen I have ever met'.¹⁰⁹ Twelve years later, the Frenchman interpreted Pedder's

¹⁰⁴ H. Rosenman (ed. and trans.), Jules Sébastien-César Dumont d'Urville, *An Account in Two Volumes of Two Voyages to the South Seas by Captain (later Rear-Admiral) Jules S-C Dumont d'Urville of the French Navy to Australia, New Zealand, Oceania, 1826-1829, in the Corvette Astrolabe and to the Straits of Magellan, Chile, Oceania, South East Asia, Australia, Antarctica, New Zealand and Torres Strait, 1837-1840, in the Corvettes Astrolabe and Zélée* (Melbourne, Melbourne University Press, 1987), vol. 2, p. 446.

¹⁰⁵ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 2, p. 450. The expedition was ravaged by disease in the tropics, and several crew members died after their arrival in Hobart Town.

¹⁰⁶ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 2, pp. 446-447.

¹⁰⁷ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 1, p. 170.

¹⁰⁸ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 1, p. 175.

¹⁰⁹ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 1, p. 175.

second invitation to join his family at Christmas ‘as evidence of sincere friendship’, for it was ‘well known how religiously Christmas Day is observed by the people of Great Britain’ as a day ‘given over to family parties’.¹¹⁰

Dumont d’Urville’s reports of his conversations with Pedder also reveal the judge’s interest in international scientific research and exploration. In 1827, having been commissioned to find the wreck of La Pérouse’s ships, Dumont d’Urville was particularly interested in Pedder’s knowledge of the ‘mission’ of Captain Peter Dillon of the East India Company, who claimed to have found evidence of La Pérouse’s expedition at Vanikoro, a coral atoll now in the Solomon Islands.¹¹¹ In April of that year, Pedder had had the opportunity to form his own impressions, when he tried Dillon in the Supreme Court on charges of assaulting and falsely imprisoning Dr Robert Tytler, the expedition’s medical officer and naturalist. As the prosecution explained to the court, ‘having acquired some information at the Malacoli [*sic*] Islands respecting the fate of Count La Perouse’,¹¹² Captain Dillon led an expedition from India ‘for the express purpose of procuring authentic information respecting the fate of Count La Perouse and his associates, and for the purpose of procuring scientific knowledge’.¹¹³ On the voyage, Dillon suffered from episodes of ‘insanity’, during which he arrested Dr Tytler on suspicion of planning a mutiny.¹¹⁴ In an incident characterised by Pedder as an ‘outrageous ebullition of feeling’, Dillon threatened to have Tytler flogged; the doctor escaped violence, but was confined

¹¹⁰ Dumont d’Urville, *Two Voyages to the South Seas*, vol. 2, p. 451.

¹¹¹ Dumont d’Urville, *Two Voyages to the South Seas*, vol. 1, p. 170.

¹¹² R. v. Dillon [1827], B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1827/r_v_dillon/> accessed 1 October 2011. Vanikoro was also known as the Manicolo Islands. J. Treadway, *Dancing, Dying, Crawling, Crying: Stories of Continuity and Change in the Polynesian Community of Tikopia* (Suva, IPS Publications/The University of the South Pacific, 2007), pp. 24-25.

¹¹³ R. v. Dillon [1827].

¹¹⁴ R. v. Dillon [1827].

to his cabin until the ship reached Hobart Town.¹¹⁵

From the evidence adduced in court, Pedder concluded that Dillon had no cause to suspect mutinous behaviour, but had unreasonably 'entertained a violent dislike to Dr Tytler', who had offered provocation 'of the most remote nature'.¹¹⁶ Citing Lord Chief Justice Abbott, Pedder reminded the court that a captain's authority 'is not "despotic," but ... is to be exercised with caution, moderation and justice'.¹¹⁷ Addressing himself directly to Captain Dillon, the chief justice then observed that 'it is proper, ... that you should be made to feel, that the power given to masters of ships is one conferred on them for promoting the general interests committed to their care, and not one to be exercised by them for the redress of their own wrongs, or the gratification of their own resentments'.¹¹⁸ Pedder's judgement in the case indicates that he interpreted Dillon's 'very oppressive' conduct towards Tytler as evidence of a master overstepping the bounds of his legitimate authority. He sentenced Dillon to an exemplary term of imprisonment, and additional financial penalties.¹¹⁹

Discussing the French expedition with Dumont d'Urville over dinner eight months later, Pedder appeared 'pained' that his guest should persist 'in abandoning brilliant explorations' in the Southern Ocean 'in order to visit Vanikoro' on the strength of Dillon's claims.¹²⁰ The 'last news' from the Irish captain had confirmed Pedder in 'his opinion that Dillon's first story' about Vanikoro was 'nothing but a tissue of lies'.¹²¹ In spite of Pedder's misgivings,

¹¹⁵ R. v. Dillon [1827].

¹¹⁶ R. v. Dillon [1827].

¹¹⁷ R. v. Dillon [1827]. Pedder refers to C. Abbott, *A Treatise of the Law Relative to Merchant Ships and Seaman* (various editions; originally published London, 1802).

¹¹⁸ R. v. Dillon [1827].

¹¹⁹ R. v. Dillon [1827]. Dillon was sentenced to 'be committed to the custody of the Sheriff for 2 calendar months, pay a fine of £50 to the King, and enter into a recognizance himself in £200, and two sureties in £100 each to keep the peace towards Doctor Tytler for 12 months'.

¹²⁰ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 1, p. 174.

¹²¹ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 1, p. 174.

Dumont d'Urville went on to discover an anchor from one of La Pérouse's ships on the island. He erected a memorial to the lost expedition at Vanikoro in 1828.

In Hobart Town again in 1839, on his way to the Antarctic, the French explorer was eager for information on the rival 'American expedition commanded by Captain Wilkes', then in Sydney 'making preparations to go back to the ice'.¹²² Dumont d'Urville could learn few details from Pedder, however: "Extreme reserve has been imposed on the men", he told me; "the officers are instructed to remain absolutely silent, so that nothing has transpired about the discoveries and the work of that expedition".¹²³ On their return from the Polar regions in February 1840, the French enjoyed another sojourn in Hobart Town. On 24 February, Dumont d'Urville recorded that he spent his final evening on land 'with Sir John Pedder', before returning to the *Astrolabe* at 10 pm.¹²⁴ Having again 'overwhelmed' Dumont d'Urville 'with kindness', Pedder earned the French captain's 'friendship and very special gratitude'.¹²⁵

In addition to the many retired and half-pay military and naval officers attached to the civil establishment in Van Diemen's Land, serving officers of the British regiments garrisoned in Van Diemen's Land were an important feature of colonial life. Many, like Colonel Logan, Pedder's colleague in the Executive Council, filled *ex officio* government offices, or served on military juries in the

¹²² Dumont d'Urville, *Two Voyages to the South Seas*, vol. 2, p. 451.

¹²³ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 2, p. 451.

¹²⁴ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 2, p. 495.

¹²⁵ Dumont d'Urville, *Two Voyages to the South Seas*, vol. 2, p. 495. The Pedders' continuing hospitality to French officers is confirmed by Jane Franklin, who wrote to her husband from New Zealand in 1841 that, 'Capt. Lavand [of the *Aube*] sent me a number of the "Annales Maritimes et Coloniales" (an official Admiralty publication) in which is an article of M[onsieur] Cecile [sic] on V.D.L. with the praises of its inhabitants, many of whom are mentioned by name'. Lady Franklin promised to send a copy of the article to Hobart Town, so that the Governor could 'let Lady Pedder and all whom it concerns see it'. Jane Franklin to John Franklin, 21 April 1841, in G. Mackaness (ed.), *Some Private Correspondence of Sir John and Lady Jane Franklin (Tasmania, 1837-1845). Part II* (Dubbo, Review Publications, 1977), p. 11.

Supreme Court.¹²⁶ More generally, officers and their regiments were highly visible, as garrison and internal security duties took them across the island. Less belligerently, the army also provided the regimental bands which played an important role in public entertainments. At the 'first Public Concert' on the island in 1826, the 'Band of the 40th Regt.' performed in the courthouse, arranged in three rows on 'each side of what *was* the Judge's bench'.¹²⁷ Having enthusiastically declared that the performances were 'such as would have astonished and delighted the most fastidious ear of the London critic, scarcely escaped from the fascination of Hanover-square [concert rooms]', the *Colonial Times* observed that the concert attracted a 'numerous assemblage of Ladies and Gentlemen'.¹²⁸ In spite of bad weather, the audience was estimated at not 'less than 250 or 300'; Chief Justice and Mrs Pedder were named among the 'distinguished individuals present'.¹²⁹

As in other colonies, senior members of the military establishment were also integrated into to the broader social calendar of Hobart Town, with many regularly attending and hosting balls and suppers. On Tuesday, 18 March 1828, for example, the 'spacious apartments recently erected in the Barrack-square, were thrown open by the Officers of the 40th Regiment, to a numerous and fashionable assemblage of their friends, for a splendid Ball and Supper, to which most of the principal inhabitants had received cards'.¹³⁰ When the rooms began 'to fill soon after 10 o'clock', Chief Justice and Mrs Pedder joined 'nearly

¹²⁶ Logan served as commanding officer of William Pedder's regiment, the 63rd. At the time of the regiment's transfer to Madras, Governor Arthur publicly acknowledged the 'support he has invariably received from Lieutenant-Colonel Joseph Logan in the discharge of the very onerous duties which have devolved upon him since his arrival, as a member of the Executive Council and of other multifarious services unconnected with military detail, in which he has ever exercised an earnest desire to support the local government, and to promote the best interest of the community'. *Hobart Town Courier*, 27 December 1833, p. 2.

¹²⁷ *Colonial Times*, 29 September 1826, p. 3. Original emphasis.

¹²⁸ *Colonial Times*, 29 September 1826, p. 3. The Hanover Square (or Queen's Concert) Rooms were the principal concert venue in London in the late eighteenth and nineteenth centuries.

¹²⁹ *Colonial Times*, 29 September 1826, p. 3.

¹³⁰ *Hobart Town Courier*, 22 March 1828, p. 3.

120 persons' to form 'an assemblage of fashion, beauty, and elegance, worthy of Almacks [Assembly Rooms in London] itself'.¹³¹ As will be explored in Chapter 6, the chief justice was impressed by the 'intelligence, ... impartiality, and ... unwearied attention' of military officers in the jury box.¹³² On a social level, the officer class also earned Pedder's approbation, as revealed in a private letter to George Arthur, dated 28 March 1838:

We shall soon lose the 21st [regiment] and altho [*sic*] I don't know many of them, nor any of them very intimately I shall be sorry to part with them. Take them as a whole, and I believe I may say individually, I don't think there is a better bred and more gentlemanly corps of officers in the service.¹³³

Pedder's partiality for military officers reflected both contemporary esteem for members of the armed forces, and more personal connections through his brother, Captain William Pedder; father-in-law/uncle, Colonel Thomas Everett, nephew-in-law, Captain Loftus Nunn; and close friends, Colonel George Arthur, Captain John Montagu and Captain Matthew Forster. The recall or redeployment of regiments not only heralded changes to the composition of Hobart Town society, but also marked personally significant moments in Pedder's life. As illustrated in Chapter 2, the redeployment of Captain Pedder's regiment to Madras in 1833 marked the brothers' permanent separation, while the recall of Captain Nunn's regiment to Britain in 1856 influenced the timing of Pedder's own repatriation to England.

While balls and suppers for larger numbers were evidently popular in colonial society, more intimate dinner parties were also important sites for reciprocating hospitality and reiterating colonial hierarchies. Governor Arthur had observed in 1825 that, 'A Public Table in this Country is a very serious affair'.¹³⁴ As part of their official duties, vice-regal couples regularly hosted dinner parties at

¹³¹ *Hobart Town Courier*, 22 March 1828, p. 3.

¹³² Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274a, AJCP reel PRO 231.

¹³³ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹³⁴ Arthur to Wilmot Horton, 14 September 1825, *HRA* III, IV, p. 370.

Government House.¹³⁵ Similarly, the chief justice provided official and semi-official entertainments, as evidenced by various contemporary reports of the Pedders entertaining colonial officials, including successive governors.¹³⁶ Other guests included Port Arthur Commandant, Charles O'Hara Booth, who recorded that when he and the Governor Arthur joined the Pedders for dinner in 1836, it was 'only a family party'.¹³⁷ The following year, Booth recorded dining twice with Pedder, once in the company of Sir John Jeffcott, who spent several months on the island en route to take up judicial office in South Australia.¹³⁸

A detailed, personal account of an official dinner party appears in the journal of Caroline Denison, wife of Governor Sir William Denison, who took office in 1847. Newly arrived from England, the Denisons were not familiar with the customs of colonial society. As Lady Denison recorded in April 1847, 'Yesterday we went to dine with Sir John Pedder ... and it was by way of being rather a formal affair, whereby I became initiated into one or two little matters of colonial etiquette, with which I was unacquainted before'.¹³⁹ Recalling that 'Sir John Pedder came down to meet William [Denison] at the hall door', Caroline Denison admitted that the 'proceeding ... took me so much by surprise, that I was very near taking him for a servant, and passing by him without notice'.¹⁴⁰ 'When dinner was announced', she continued, 'Sir John, instead of leading the way, made William

¹³⁵ The Arthurs hosted regular Tuesday dinner parties. Fenton, *Journal of Mrs Fenton*, p. 351.

¹³⁶ The *Sydney Gazette* reported, for instance, that 'the Chief Justice and Mrs Pedder entertain His Excellency [Sir John Franklin] early in the next week'. *Sydney Gazette*, 31 January 1837, p. 2.

¹³⁷ D. Heard (ed.), *The Journal of Charles O'Hara Booth, Commandant of the Port Arthur Penal Settlement* (Hobart, Tasmanian Historical Research Association, 1981), p. 202.

¹³⁸ Heard, *Journal of Charles O'Hara Booth*, pp. 206, 227; R.M. Hague, 'Jeffcott, Sir John William (1796-1837)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020014b.htm>> accessed 23 August 2010.

¹³⁹ Journal of Caroline Denison, 24 April 1847, in R. Davis and S. Petrow (eds.), *Varieties of Vice-Regal Life (Van Diemen's Land Section) by Sir William and Lady Denison* (Hobart, Tasmanian Historical Research Association, 2004), p. 48.

¹⁴⁰ Journal of Caroline Denison, 24 April 1847, in Davis and Petrow, *Varieties of Vice-Regal Life*, p. 48.

go first with Lady Pedder, and then followed himself with me'.¹⁴¹

Denison's younger brother, Alfred, also present, was 'experienced in colonial etiquette' and informed his sister-in-law that 'all this ... was strict etiquette, though it is not often done'.¹⁴² That Pedder was not alone in expecting this level of formality when entertaining the new governor is revealed by Lady Denison's admission that

my good man is not yet thoroughly *au fait* with all these things, and consequently, I am afraid, considerably wearied all the other gentlemen of the party, who expected him to make the move for them to come into the drawing-room after dinner, while he was waiting for the master of the house to do so.¹⁴³

Concluding this private account of her husband's awkwardness in their new milieu, Lady Denison recorded that Alfred 'knew what was expected, telegraphed expressive looks to [his brother] across the table, and did his possible [*sic*] to stimulate him to move, but in vain'.¹⁴⁴ As a result, the gentlemen 'remained an incredible time in the dining-room' until 'at last William made a doubtful move in desperation, which was eagerly caught at by the rest, and out they came'.¹⁴⁵ Citing Caroline Denison's account, Bennett asserts that Pedder's 'notions of entertainment' were 'always' rather formal.¹⁴⁶ As the archival evidence and Lady Denison's own journal entry demonstrate, however, colonial etiquette rarely demanded such rigid formality, and John and Maria Pedder regularly presided over more convivial, unofficial entertaining.

¹⁴¹ Journal of Caroline Denison, 24 April 1847, in Davis and Petrow, *Varieties of Vice-Regal Life*, p. 48.

¹⁴² Journal of Caroline Denison, 24 April 1847, in Davis and Petrow, *Varieties of Vice-Regal Life*, p. 48.

¹⁴³ Journal of Caroline Denison, 24 April 1847, in Davis and Petrow, *Varieties of Vice-Regal Life*, p. 48.

¹⁴⁴ Journal of Caroline Denison, 24 April 1847, in Davis and Petrow, *Varieties of Vice-Regal Life*, p. 48.

¹⁴⁵ Journal of Caroline Denison, 24 April 1847, in Davis and Petrow, *Varieties of Vice-Regal Life*, p. 48.

¹⁴⁶ Bennett, *Sir John Pedder*, p. 88, citing Caroline Denison's journal from W. Denison, *Varieties of Vice-Regal Life, Vol. I* (London, Longmans, Green and Co., 1870), pp. 36-37.

Similarly, *contra* Bennett's assertion that Pedder found pleasure in few 'recreations apart from his churchgoing',¹⁴⁷ local press reports indicate that the judge enjoyed a range of public entertainments. Of the judge's attendance at the theatre with his wife in September 1842, for example, the *Courier* declared that, 'The public were much gratified to see our worthy Chief Justice take so much interest in the performance'.¹⁴⁸ Three months later, the *Colonial Times* noted approvingly that the Pedders – now well into middle age – had enjoyed the annual Bachelors Ball. 'The dancing', it reported, 'was kept up with spirit till day-light. Sir J. L. Pedder and Lady ... and several others of our *elite* were present and appeared to enjoy the amusements of the evening with the most hearty good will, entirely devoid of pride or hauteur'.¹⁴⁹ Presumably for the benefit of their adolescent niece, the Pedders continued to attend balls into the 1850s. On New Year's Day 1850, for example, 'Sir John, Lady and Miss Pedder' attended a 'Juvenile Ball' at Government House, while in April the family joined 250 of the local elite at Lady Denison's ball.¹⁵⁰

Many of Pedder's friends, including Wedge and Bishop Nixon, were devout Anglicans, but his social life did not revolve around religion or, indeed, the Church of England. Pedder's reputation as a High Churchman appears to be based on his opposition in the Executive Council to government funding for other 'sects'.¹⁵¹ This probably has less to do with faith, than Pedder's establishmentarianism. As Peter Boyce points out, the Church of England was the 'official', if not the established, church in Van Diemen's Land.¹⁵² Anglican

¹⁴⁷ Bennett, *Sir John Pedder*, p. 113.

¹⁴⁸ *Courier*, 16 September 1842, p. 3.

¹⁴⁹ *Colonial Times*, 6 December 1842, p. 3. Original emphasis.

¹⁵⁰ *Colonial Times*, 4 January 1850, p. 3; *Courier*, 20 April 1850, p. 2.

¹⁵¹ P.A. Howell, 'Pedder, Sir John Lewes (1793–1859)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/pedder-sir-john-lewes-2542/text3457>> accessed 10 August 2011.

¹⁵² P. Boyce, 'Anglicanism' in A. Alexander (ed.), *The Companion to Tasmanian History* (Hobart,

clergy were appointed and paid by the government, and co-operated with the colonial administration in maintaining the machinery of convictism. Continuing its traditional subservience to the Crown, the Church of England in Van Diemen's Land retained its pre-eminence over the other denominations in the colonial hierarchy. For officials, soldiers, convicts and free settlers, church attendance was not merely an act of private worship, but an essential (and often compulsory) part of public life. Little is recorded of Pedder's own religious observance in the various parish churches he attended, but he clearly took a broader interest in the diffusion of Christianity. He was a member, for instance, of the non-denominational British and Foreign Bible Society, which translated and distributed subsidised copies of the Bible throughout the empire. In 1835, however, he told Arthur that he had 'long since ceased to be a member' of the society and had 'no thoughts of belonging to it again'.¹⁵³ Indicating that his decision to leave the Bible Society was more about personalities than religion, Pedder abstained from commenting on his reasons, for fear that the 'combative' Rev William Bedford should attribute his departure to 'any dissatisfaction I felt at his conduct as secretary'.¹⁵⁴

3.2 Pedder's inner circle

During the administration of George Arthur (1824-1836), Pedder was strongly identified with the autocratic governor. Throughout the subsequent governorship of Sir John Franklin (1837-1843), a group of senior colonial officials – designated the Arthur 'faction' by their opponents – continued to

Centre for Tasmanian Historical Studies, 2006), online edition, <http://www.utas.edu.au/library/companion_to_tasmanian_history/A/Anglicanism.htm> accessed 20 November 2011.

¹⁵³ Pedder to Arthur, 21 September 1835, Arthur Papers, vol. 10, ML ZA 2170.

¹⁵⁴ Pedder to Arthur, 21 September 1835, Arthur Papers, vol. 10, ML ZA 2170; [no author], 'Bedford, William (1781–1852)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/bedford-william-1760/text1963>> accessed 20 November 2011.

wield considerable political and economic influence in the colony.¹⁵⁵ Key members included Arthur's nephews-in-law, Colonial Secretary, John Montagu, and Chief Police Magistrate, Matthew Forster. Pedder was bound to the 'faction' through personal and professional relationships, as well as political sympathies. Writing privately to Arthur in 1846, he clearly identified himself as belonging to "the faction" as they used to call *us* until poor old Sir John [Franklin] designated *us* as a "clique".¹⁵⁶ Some of the political dimensions of these associations will be explored in Chapter 6. Here, the focus turns to Pedder's enduring friendships with Arthur, Montagu and Forster.

A selection of Pedder's correspondence, which survives among the Papers of Sir George Arthur in the Mitchell Library, illuminates both the epistolary norms of his generation and class, and something of his personal and professional relationships with Arthur.¹⁵⁷ While the bulk of the collection comprises official communication, a handful of private letters and notes provides glimpses of Pedder's daily life and emotional concerns. The conventionally deferential tone of the chief justice's official correspondence contrasts with the genuine expressions of emotion of his private letters to Arthur. While both types of letter begin with the formal salutation, 'My Dear Sir', and close with formulaic expressions of obligation, there is a marked warmth in his private correspondence which reaffirms Pedder's affection and esteem for Arthur. Compare, for example, the standard formal ending, 'Believe me my dear Sir your very faithful and obedient servant',¹⁵⁸ with the more demonstrative, 'Believe me

¹⁵⁵ C.R. Joel, *A Tale of Ambition and Unrealised Hope: John Montagu and Sir John Franklin* (Melbourne, Australian Scholarly Publishing, 2011), p. 5.

¹⁵⁶ Pedder to Arthur, 18 February 1846, Arthur Papers, vol. 10, ML ZA 2170. Editorial emphasis.

¹⁵⁷ A little over 180 letters, notes, and memoranda, written by Pedder between 1824 and 1846, are among the Papers of Sir George Arthur held in the Mitchell Library, State Library of New South Wales.

¹⁵⁸ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169. Other variants include 'your most obedient and very humble servant'. Pedder to Arthur, private, 12 October 1824, Arthur Papers, vol. 9, ML ZA 2169.

my dear Sir your most sincerely attached and faithful friend'.¹⁵⁹

The depth of Pedder's attachment to Arthur is strikingly revealed in an otherwise cryptic letter. Its date and context cannot be inferred from the place of the letter within the Arthur Papers, which were rearranged for microfilming in 1939.¹⁶⁰ In the absence of Arthur's original note (referred to in the letter) and a date for Pedder's response, it is unclear what precipitated his fear of losing Arthur's friendship. What is clear, however, is the importance of the relationship. This expressive letter offers rare access to both Pedder's emotional world and the dynamics of his intimacy with Arthur. Despite the absence of context, the letter reveals valuable glimpses of the enculturated constructions of authority and male friendship underpinning Pedder's relationship with Arthur.¹⁶¹ It is significant that Pedder was Arthur's subordinate in both age and status within the colonial hierarchy. Nine years younger than his friend and superior, Pedder is likely to have regarded Arthur as both patriarch and mentor. The product of a hierarchical society and masculinised public school system, he would also have been conditioned to adopt the subservient position of 'faithful friend and servant' in a manner which did not diminish perceptions of manliness.

In several passages in this letter, Pedder emphasises his subordinate position in the relationship. He begins, for example, by begging Arthur 'to believe that I feel very sensibly the very kind feeling and condescension which you have manifested towards me'.¹⁶² With its connotations of both generosity on the part of the superior and unworthiness on the part of the inferior, Pedder's choice of the word 'condescension' is revealing. The obligations of friendship are also an

¹⁵⁹ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹⁶⁰ A note informs microfilm users that a batch of undated letters at the end of volume 10 'cannot be put into chronological order, but are arranged, as far as is possible, under the subjects with which they deal'.

¹⁶¹ My grateful thanks to clinical counsellor, Berry Dunston, for offering invaluable psychological insights into Pedder's relationship with Arthur, as revealed in his correspondence.

¹⁶² Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170.

important theme. Acknowledging that he has ‘much for which I ought to be and I hope I am grateful’, Pedder intimates that he has failed to honour part of his obligation to Arthur. As he continues, ‘I know what I must appear to you. I wish you to believe nevertheless that I am not what I appear – ungrateful and contemptuous’.¹⁶³ Acknowledging his lapse, and having established his contrition, Pedder goes on to assert gently that his fault is not one of character. ‘You have known me now for some time’, he reminds Arthur.¹⁶⁴ ‘If I have hitherto appeared worthy of the friendship you have shewn [*sic*] to me do not believe that I can have at once ... become so good for nothing’.¹⁶⁵ Then, reiterating his claim to be worthy of Arthur’s friendship, and its importance – both to himself and his wife – Pedder again pleads not to be excluded from this uniquely sustaining colonial fellowship: ‘If upon reflection you are persuaded that my fault has been one rather of the head than the heart, you will not I hope deprive us of that which we both so much esteem and of which we both have so much need’.¹⁶⁶

Pedder’s preparedness to express his vulnerability in this letter suggests that he felt sufficiently secure in his relationship with Arthur to admit to ‘foolish[ness]’ and ‘fault[s]’ without losing Arthur’s respect.¹⁶⁷ Instead of expressing these sentiments in ephemeral, ‘familiar conversation’, Pedder’s letter is a chosen response to an episode in the relationship where he felt conscious that he had ‘acted with great weakness’.¹⁶⁸ The letter thus becomes a permanent memorial to a significant personal relationship, which has been overshadowed by the two men’s professional association.

¹⁶³ Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170.

¹⁶⁴ Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170.

¹⁶⁵ Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170.

¹⁶⁶ Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170.

¹⁶⁷ Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170.

¹⁶⁸ Pedder to Arthur, Thursday Evening, [n.d.], Arthur Papers, vol. 10, ML ZA 2170. By contrast, on the topic of Pedder’s lack of professional promptness, Arthur had chosen to ‘give a hint upon the points where his failing lies’ in ‘familiar conversation’. Arthur to Hay, 25 November 1828, *HRA* III, VII, p. 658; Bennett, *Sir John Pedder*, p. 104.

Pedder's strong emotional attachment to Arthur is further expressed in a letter written at the time of the Governor's recall by the Colonial Office in 1836. Whereas Arthur's political enemies rejoiced, Pedder was deeply distressed. As he confessed on 26 May 1836,

When I waited upon Your Excellency yesterday immediately after the receipt of your note [referring to the recall] I was so much overwhelmed with its contents that I am quite sure I did not express the feelings with which my heart was full. Nor can I now but very imperfectly.¹⁶⁹

'For myself', Pedder continued, 'I freely confess my sorrow at the idea of Your Excellency's departure is almost exclusively of a selfish nature. When I lose you I shall lose one of the kindest and best friends I ever had in my life, and, what is sad to say, my only friend here'.¹⁷⁰ Bennett appears to accept this statement at face value as an admission by Pedder that Arthur was the 'sole exception' to his 'want of friends in the Colony'.¹⁷¹ A closer reading of Pedder's correspondence, however, reveals a tendency to hyperbole which, in this case, is more meaningfully read as an affirmation of Pedder's esteem for the letter's recipient than an objective comment about his lack of intimate friends.

Common social, cultural, political and religious sensibilities should not be underestimated as the bases for an enduring friendship between Pedder and Arthur. Moreover, Arthur provided the only local exemplar for the young and inexperienced judge to fashion himself as a representative of the distant imperial government. While it is beyond the scope of this study to explore the psychological implications of their relationship in any depth, it is possible to infer that Arthur provided a vital mirror; his support and encouragement were also crucial. As Pedder affirmed in 1836, 'Mrs Pedder and myself are deeply sensible of the never ceasing friendship and attention with which you have

¹⁶⁹ Pedder to Arthur, 26 May 1836, Arthur Papers, vol. 10, ML ZA 2170.

¹⁷⁰ Pedder to Arthur, 26 May 1836, Arthur Papers, vol. 10, ML ZA 2170.

¹⁷¹ Bennett, *Sir John Pedder*, p. 16.

honoured us ever since our arrival in the Colony, and feel bound by a strong attachment to your person and your amiable family'.¹⁷²

It is not surprising, then, that, having so closely aligned himself with Arthur, both personally and politically, for twelve years, Pedder anticipated the imminent separation from his mentor with sorrow. Colonial diarist, George Boyes, records that when Arthur took his final leave of the colony on 29 October 1836, he, too, was distressed and relied on his close friend for support. Leaving Government House to board his ship back to England, Arthur 'walked from the drawing room ... round by the Varhandah [*sic*] leaning upon Mr Pedder's arm and weeping bitterly'.¹⁷³

The bonds of friendship between the two families were maintained after the Arthurs' return to England. In April 1837, in his 'first letter' since Arthur's departure, Pedder assured his old friend that he had not 'forgotten you or your family', nor had his 'sincere regard and affection for you all ... abated one jot'.¹⁷⁴ Reaffirming his continued interest in Arthur's wellbeing, he wrote that, 'I can assure you with perfect truth that Mrs Pedder and myself are amongst those who look forward with the greatest anxiety to hear of you [...] I long to hear news of your arrival'.¹⁷⁵ In March 1838, Pedder referred with gratitude to Arthur's intention to assist his younger brother, who had been stationed at Madras with the 63rd Regiment. William Pedder's sudden death in June 1837, however, intervened:

I know not my dear Sir how to thank you sufficiently for your kindness not only to me but to those whom you know to be dear to

¹⁷² Pedder to Arthur, 26 May 1836, Arthur Papers, vol. 10, ML ZA 2170.

¹⁷³ G.T.W.B. Boyes, *Diary of G.T.W.B. Boyes, Van Diemen's Land, Feb 28th, 1833-June 1st, 1835*, University of Tasmania Library Special and Rare Materials Collection, Australia (Unpublished), 29 October 1836, <[http://eprints.utas.edu.au/8848/1/rs_25_2_\(4\)_GWT_Boyes_Diary_28th_February_1833-June_1st_1835.pdf](http://eprints.utas.edu.au/8848/1/rs_25_2_(4)_GWT_Boyes_Diary_28th_February_1833-June_1st_1835.pdf)> accessed 4 September 2011.

¹⁷⁴ Pedder to Arthur, 12 April 1837, Arthur Papers, vol. 10, ML ZA 2170.

¹⁷⁵ Pedder to Arthur, 12 April 1837, Arthur Papers, vol. 10, ML ZA 2170.

me. Long before this reaches you you will probably have learnt that that which you intended for poor dear William could never have availed him.¹⁷⁶

In the same letter, Pedder offered 'my kindest regards to Lady Arthur and all the family ... and my love and many thanks to Miss Fanny' – the Arthurs' twelve-year-old daughter – 'for the prints she was so good as to send me'.¹⁷⁷ In 1846, after a separation of ten years, Pedder continued to maintain the 'strong attachment I have so long professed and do still most warmly feel for you and all the members of your family'.¹⁷⁸ Ever the tardy correspondent, Pedder confessed that 'I am nevertheless fearful that you may think me guilty of a wilful indolence which would be inconsistent with such feelings'.¹⁷⁹

Many of the private letters dated after Arthur's departure from the colony are characterised by a similarly expressive – and even gossipy – tone, as Pedder enquires after Arthur and his family, and provides updates on people and events in Van Diemen's Land. In a letter dated 28 May 1838, after offering his opinion on political developments and personalities in the colony, Pedder breezily adds a summary of the latest comings and goings of mutual acquaintances, which illustrates his interest in the vicissitudes of the colonial community:

Mrs Wentworth arrived in the *Seppings*: a little altered in appearance but as amiable and good natured as ever. Her only news is that Fereday is a man of fortune living in good style and much respected – and that he might have been in Parliament if the electors would but have returned him free of Expenses. Captⁿ Wood of the Clyde you may perhaps have heard has lost his wife and gone home. Old Reid of Ratho also is gone home and Captⁿ Langdon – and Bethune it is said is going. Willis is off – he went by way of Sydney – he is either ruined or his affairs are in a deplorable state.¹⁸⁰

¹⁷⁶ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹⁷⁷ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170. The Arthur family included eleven surviving children. A. Alexander, *Obligated to Submit: Wives and Mistresses of Colonial Governors* (Hobart, Montpelier Press, 1999), pp. 116-117.

¹⁷⁸ Pedder to Arthur, 18 February 1846, Arthur Papers, vol. 10, ML ZA 2170.

¹⁷⁹ Pedder to Arthur, 18 February 1846, Arthur Papers, vol. 10, ML ZA 2170.

¹⁸⁰ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170. Original emphasis.

In Arthur's nephews-in-law, John Montagu and Matthew Forster, Pedder retained living connections in Van Diemen's Land to his dear friend. In a overstatement typical of his correspondence – and probably intended to emphasise his continued loyalty to the Arthur 'faction' – Pedder suggested to Arthur in a letter of 1838 that, beyond 'the parties at Government House',¹⁸¹ his intimate circle had become so reduced that 'In truth we go no where [*sic*], that is we are asked no where [*sic*] but to the Forsters and Montagus'.¹⁸²

Evidence of Pedder's friendship with Colonial Secretary, John Montagu, emerges from documents relating to Montagu's suspension from office in 1842, following a series of disputes with Governor and Lady Franklin.¹⁸³ John and Maria Pedder had attempted to mediate, unsuccessfully, in some of these conflicts,¹⁸⁴ and Pedder continued to support Montagu privately. Ever cautious to maintain his professional integrity, Pedder had made it a 'rule' not to join in 'public addresses to government officers placed in the circumstances in which' Montagu now found himself: with evident regret, he informed Montagu, 'I still adhere to a rule laid down for myself at a time when I could not have anticipated its application to you'.¹⁸⁵

Instead of joining in the public address, Pedder offered a testimonial 'in the more private form of a letter, which,' he told Montagu, 'you are at liberty to show whenever, and to whomever, you may judge it useful to do so'.¹⁸⁶ In this letter,

Pedder's opinion of Fereday had clearly not altered since their dispute in 1830.

¹⁸¹ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹⁸² Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

¹⁸³ J. Montagu, *Manuscript copy of the official correspondence between John Montagu and the Secretary of State for the Colonies, concerning his disagreement with Sir John Franklin, Van Diemen's Land 1841-1843* (hereafter *Montagu Manuscript*), University of Tasmania Library Special and Rare Materials Collection, Australia (Unpublished), <<http://eprints.utas.edu.au/10442/1/RS114-1.pdf>> accessed 1 October 2011.

¹⁸⁴ Joel, *A Tale of Ambition*, p. 247.

¹⁸⁵ Pedder to Montagu, 5 February 1842, *Montagu Manuscript*, f. 100; Joel, *A Tale of Ambition*, pp. 361-362.

¹⁸⁶ Pedder to Montagu, 5 February 1842, *Montagu Manuscript*, f. 100.

Pedder attested both to Montagu's many 'merits as a public officer', and the 'great regard I have always professed, and really felt for you'.¹⁸⁷ Clearly emphasising Pedder's reputation to bolster his own, Montagu declared that he was 'proud to have received such a document' from 'a man of such high honor [*sic*] and acute perceptions and whose scrupulously conscientious Character procure for his opinions the very highest consideration'.¹⁸⁸ Pedder provided further practical and moral support, inviting Montagu and his family to stay at *Newlands* in the days immediately before their departure for England in February 1842.¹⁸⁹ As Jane Franklin wrote the following year, 'very few' people in the colony 'really believe Mr M. to have been an ill-used man – probably the Pedders may be of this number, for they live in a small and very narrow circle of which the Arthur family are almost the only elements'.¹⁹⁰ Montagu indeed had many reasons to regard Pedder as a 'dear and sincere friend of nearly twenty years' standing'.¹⁹¹

Chief police magistrate, comptroller of convicts, and fellow Legislative Councillor, Captain Matthew Forster, was another longstanding colleague and key member of the 'faction'. Pedder's friendship with this 'blunt, hard-swearing soldier' was no doubt strengthened by their shared connection and loyalty to George Arthur.¹⁹² Forster's sudden death in January 1846 severed another link

¹⁸⁷ Pedder to Montagu, 5 February 1842, *Montagu Manuscript*, f. 100.

¹⁸⁸ Montagu to Anstey, Archer, Swanston, McLachlan, Ashburner, Fenton, and Kerr, 8 February 1841, *Montagu Manuscript*, f. 99; Joel, *A Tale of Ambition*, p. 436, n. 103.

¹⁸⁹ Joel, *A Tale of Ambition*, p. 244.

¹⁹⁰ Jane Franklin to Mary Simpkinson, 19 January 1843, Papers of Sir John and Lady Franklin: Franklin, Jane, Lady, 23 letters to Mary Simpkinson from Van Diemen's Land, 7 October 1837 – 19 April 1853, MS 248/174/18. Scott Polar Research Institute. National Library of Australia microfilm reel G2486; Joel, *A Tale of Ambition*, p. 246.

¹⁹¹ J. Franklin, *Narrative of Some Passages in the History of Van Diemen's Land, during the Last Three Years of Sir John Franklin's Administration of its Government* (Hobart, Platypus Publications, 1967; originally printed London, Richard and John E. Taylor, 1845), Appendix H, number 2, 'Extracts from Mr Montagu's Letter of 16th of January 1844', p. 155.

¹⁹² A.G.L. Shaw, 'Forster, Matthew (1796-1846)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010372b.htm>> accessed 10 August 2010. Forster married Arthur's niece, St Helena Worsley. They arrived in Van Diemen's Land in 1831.

with the Arthur circle, and again brought themes of loss and loneliness to Pedder's private correspondence. A week after 'poor Forster's death', Pedder told Arthur that 'It was a most awful event. No one knew that he was ill until he was past recovery. It is a sort of consolation to know that no human aid could have saved his life'.¹⁹³



Figure 9: Obelisk tombstone of Captain Matthew Forster, St John's Churchyard, New Town.¹⁹⁴
Image reproduced courtesy of the Allport Library and Museum of Fine Arts,
Tasmanian Archive and Heritage Office

After an association lasting nearly twenty-five years, Pedder's attachment to Forster was evidently strong, and he felt his loss keenly. As he confided to Arthur, 'For my part I can only say I feel again the same loneliness which I experienced when you left the colony and for so long afterwards'.¹⁹⁵ It is likely that Pedder contributed to a monument to Forster, in the form of a sandstone

¹⁹³ Pedder to Arthur, 18 February 1846, Arthur Papers, vol. 10, ML ZA 2170.

¹⁹⁴ Pen and ink drawing, attributed to Thomas Bock, c. 1847. Allport Library and Museum of Fine Arts, <<http://catalogue.statelibrary.tas.gov.au/item/?id=69525>> accessed 10 August 2010.

¹⁹⁵ Pedder to Arthur, 18 February 1846, Arthur Papers, vol. 10, ML ZA 2170.

obelisk, which was 'erected by his private friends as a testimonial of their regard' at St John's churchyard in New Town – then the Pedders' parish church.¹⁹⁶

Other family friendships were also important to Pedder. Joseph Hone, a Supreme Court colleague since 1825, publicly acknowledged their long friendship in 1855.¹⁹⁷ Hone's intimacy with the family is also indicated by his role as informant on Maria Pedder's death certificate, which he signed, 'J. Hone, Barrister at Law (Friend)'.¹⁹⁸ Pedder's medical attendant, Dr Edward Bedford, was another of his 'oldest friends', who proudly declared that he 'had had known Sir John Pedder' even 'longer than ... Mr Hone'.¹⁹⁹

The Pedders were also close to Francis Russell Nixon, the first Anglican Bishop of Tasmania, and his wife, Anna Maria.²⁰⁰ The Nixons arrived in Hobart Town in 1843, and letters from Mrs Nixon to her family in England record her first impressions: 'Sir John we like extremely, and the Bishop and he, I think, will have much in common'.²⁰¹ The chief justice would also have taken pleasure in delivering the welcome address to the Lord Bishop, on behalf of the local elite, on 3 August 1843.²⁰² In 1838, he had complained that 'Woods almanach [*sic*] for this year says that we are within the diocese of Calcutta. We might as well be for

¹⁹⁶ The monument remains *in situ* in the former cemetery. For the inscription, see Joel, *A Tale of Ambition*, p. 363.

¹⁹⁷ *Colonial Times*, 13 July 1855, p. 3.

¹⁹⁸ AOT RGD 35/5 Reg No. 297/1855.

¹⁹⁹ *Colonial Times*, 13 July 1855, p. 3. Edward Samuel Pickard Bedford (1809-1876), younger son of colonial chaplain, Rev William Bedford, arrived in Van Diemen's Land in 1823. [no author], 'Bedford, William (1781-1852)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University <<http://adb.anu.edu.au/biography/bedford-william-1760/text1963>> accessed 3 November 2011.

²⁰⁰ W.R. Barrett, 'Nixon, Francis Russell (1803-1879)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/nixon-francis-russell-2509/text3389>, accessed 13 November 2011.

²⁰¹ Anna Maria Nixon to her father [Charles Woodcock], 29 September 1843, in Nixon, *The Pioneer Bishop*, p. 12.

²⁰² *Courier*, 4 August 1843, p. 3.

all we see of our Bishop'.²⁰³

At a domestic level, the Pedders also provided practical assistance to the new arrivals. In July, Mrs Nixon wrote that 'Lady Pedder called upon me yesterday, and nothing could be kinder than she is in her offers of affording us any help in her power'.²⁰⁴ At a time when the Pedders were occupied with integrating their newly orphaned niece and nephew into their household, the couple lent the Nixons 'a little crockery, etc.' until their baggage could be unpacked, and also provided a temporary home at *Newlands* for 'Duchess', the Nixon's 'ship's cow'.²⁰⁵ Mrs Nixon soon concluded that Pedder was 'an agreeable man, and very friendly', while Maria was 'all kindness and hospitality, and a most warm-hearted creature'.²⁰⁶

Friendships from England were also maintained, as with colonial magistrate and 'overstraiter', James Simpson,²⁰⁷ and lawyer, Saxe Bannister. The trans-colonial relationship between Pedder and Bannister extended to include their closest relatives. As identified in Chapter 1, their professional acquaintance probably began in London when both men were pupils of Chancery barrister, Henry Ker. Bannister and his sisters, Harriet and Mary Anne, were also among the Pedders' travelling companions on the barque *Hibernia*.²⁰⁸ Leaving Portsmouth in November 1823, the thirteen-week voyage to Van Diemen's Land cemented

²⁰³ Pedder to Arthur, 28 March 1838, Arthur Papers, vol. 10, ML ZA 2170.

²⁰⁴ Anna Maria Nixon to Echo, 21 July 1843, in Nixon, *The Pioneer Bishop*, p. 9.

²⁰⁵ Anna Maria Nixon to her father [Charles Woodcock], 29 September 1843, and Anna Maria Nixon to Echo, 17 August 1843, in Nixon, *The Pioneer Bishop*, pp. 12, 10.

²⁰⁶ Anna Maria Nixon to Echo, 21 July 1843, and Anna Maria Nixon to her father [Charles Woodcock], 29 September 1843, in Nixon, *The Pioneer Bishop*, pp. 9, 12.

²⁰⁷ Mrs Viveash records that Simpson was an old friend of the Pedders' from England. For his role as Pedder's agent in Port Phillip, see section 3.2. Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner Letters*, p. 73; C.A. McCallum, 'Simpson, James (1792?-1857)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020409b.htm>> accessed 4 September 2009.

²⁰⁸ The *Hibernia* sailed from Plymouth on 9 November 1823 and arrived in Hobart Town on 15 March 1824. Saxe Bannister and '2 Miss Bannisters & 3 servants' sailed on to Port Jackson on 28 March. *Hobart Town Gazette*, 19 March 1824, p. 2; AOT CSO63/1, ff. 56-57.

friendships initiated in London. Maria Pedder also enjoyed the companionship of Harriet and Mary Anne – both ‘girls of the highest characters and accomplishments’.²⁰⁹ Having visited the Pedders from Sydney in 1825, the sisters permanently relocated to Hobart Town when Saxe Bannister resigned as Attorney-General of New South Wales in 1826 and travelled to the Cape Colony.²¹⁰ Similarly, common experience of the army and the Swan River colony reinforced a friendship between the two lawyers’ younger brothers, Captains William Pedder and Thomas Bannister.²¹¹ In the early 1830s, both officers were transferred from Swan River to Hobart Town, where they moved in the same circles. Colonial diarist, George Boyes, records dining with both men on various occasions: while William Pedder could be ‘very entertaining’, Tom Bannister was a ‘regular bore’.²¹²

Conclusions

In contrast to his portrayal as a solitary ascetic, the evidence of the colonial archive reveals that Sir John Pedder was a warm and hospitable man, whose wide-ranging interests and community engagement were recognised by his contemporaries. Surrounded by three generations of his extended family, the judge also enjoyed the companionship of many old and new friends. Pedder was conscious of his rank as a chief justice and a gentleman, and excluded some professional associates from his personal sphere. Colleagues who did become longstanding friends proudly acknowledged their enduring relationships.

²⁰⁹ Boyes to Mary Boyes, 15 October 1826, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, p. 262.

²¹⁰ H. King, *Elizabeth Macarthur and her World* (Sydney, Sydney University Press, 1980), p. 133; Journal of William Sorell (transcript), 3 January 1825, p. 54; *Colonial Times*, 30 September 1825, p. 2; *Colonial Times*, 19 January 1827, p. 2.

²¹¹ Thomas Bannister (1799-1874) was an officer in the 15th Regiment of Foot, and had served as Government Resident at Fremantle, in which capacity he interviewed William’s future partner, Frances Preddy, in 1831. Government Resident, Fremantle, to the Colonial Secretary, 4 May 1831, State Records Office Western Australia, Colonial Secretary’s Office, Series No. 2941, Correspondence – Inwards, item no. 15, consignment no. 36.

²¹² Diary of George Boyes, 26 January 1832, and 11 April 1832, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, pp. 526, 559-560.

Pedder's demonstrative correspondence reveals that he was sensitive to the obligations of friendship and felt genuine affection for close friends and their families. An attentive reading of his letters to George Arthur suggests that an unrecognised tendency to hyberbole has distorted previous interpretations of this central colonial friendship. Far from being Pedder's 'only friend' in Van Diemen's Land, Arthur was at the centre of a group of friends and associates – the Arthur 'faction' – who formed the core of Pedder's inner circle.

CHAPTER 4

A MODEL OF RESPECTABILITY

Constituting a ‘broad body of evidence that resonates with but is different from the documentary record’,¹ material culture provides a valuable additional lens through which to interpret Pedder’s life-world. As leading American material culture studies scholar Bernard L. Herman explains, in this interpretive approach ‘objects or groups of objects’ help to describe ‘relationships ... between people and the worlds they inhabit’.² ‘How the house or chair or meal or landscape charts behaviors [*sic*] and the etiquette that superintend everyday interactions’, Herman contends, ‘is central to understanding and narrating the past’.³ This ‘object-driven’ approach interrogates everyday items and spaces (and related documentary sources) as ‘evidence of other complex social relationships’.⁴

The extant material traces of Pedder’s life in Van Diemen’s Land are limited and dispersed, but many of the relationships and activities with which they were associated can be traced through archival sources, including landscape paintings, estate plans, auction notices, newspaper articles, and architects’ reports. Illuminating the spatial, material and social contexts of Pedder’s domestic world, section 4.1 surveys his three official residences, including the gardens which provided a vital refuge from public life. Ineligible for Crown land grants in Van Diemen’s Land, Pedder’s relationship to landed property, via his many friends among the ‘overstraiters’, is also identified in his private

¹ B.L. Herman, ‘Material culture studies, architecture, the use of space, and Quaker aesthetics’, *Interpretive Plan Report* (2002), Stenton Historic House Museum, para 2, <http://www.stenton.org/research/herman_materials.cfm> accessed 20 July 2010.

² Herman, ‘Material culture studies’, para 2.

³ Herman, ‘Material culture studies’, para 2.

⁴ K. Harvey, ‘Introduction’ in K. Harvey (ed.), *History and Material Culture: A Student’s Guide to Approaching Alternative Sources* (Abingdon, Routledge, 2009), p. 2; see also B.L. Herman, *The Stolen House* (Charlottesville and London, University of Virginia Press, 1992), pp. 4, 11.

investments in the Port Phillip District.

Kirsten McKenzie emphasises that reputation functioned as a ‘resource’ to be protected and exploited in a ‘highly competitive social world’.⁵ A person’s good name – their claim to ‘respectability’ – was ‘closely linked to concrete issues of opportunity and loss’.⁶ Section 4.2 explores Pedder’s embodiment of two key aspects of reputation for a nineteenth-century gentleman: character and philanthropy. Pedder was widely acknowledged as a man of integrity, and on the rare occasions when his character was publicly impugned, he firmly defended his reputation. Pedder also used his high standing to improve the wellbeing of settler-colonists, donating his time and money to emerging cultural and philanthropic bodies, and exerting personal influence with the government to help vulnerable members of the community.

4.1 Material culture: keeping up appearances

From everyday household objects and imported luxury goods to the European ‘landscapes’ (re)created by the colonists, material culture is central to understanding and narrating settler life in Van Diemen’s Land.⁷ Even in the earliest years of settlement, the busy colonial port of Hobart Town connected its inhabitants to pan-imperial culture and fashions, as ships circulated people, objects, texts and ideas across the globe. As McKenzie demonstrates, many of these items became ‘weapons to be wielded in claims of status’.⁸ Writing in 1828, for example, George Boyes advised his wife, Mary, to arrive from England ‘as respectably as you can – remember that, you don’t know and can’t conceive

⁵ K. McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne, Melbourne University Press, 2004), p. 10.

⁶ McKenzie, *Scandal in the Colonies*, pp. 10, 17.

⁷ While the meaning of ‘landscape’ is often ambiguous, it is increasingly used by scholars of material culture to identify ‘a product (or by-product) of human endeavour’, as opposed to ‘untouched’ nature. M. Moskowitz, ‘Backyards and beyond: Landscapes and history’ in K. Harvey (ed.), *History and Material Culture: A Student’s Guide to Approaching Alternative Sources* (Abingdon, Routledge, 2009), pp. 70-71.

⁸ McKenzie, *Scandal in the Colonies*, pp. 56, 58.

the value of first impressions in such a colony as this. If you don't come into it respectably you will never be respected afterwards'.⁹ Similarly illuminating the public performance of gentility through material culture, Ellen Viveash, newly arrived from India, observed in 1834 that she '*never* saw anything like the Hobart Town extravagance' in ladies' fashions.¹⁰ Moreover, she reported, carriages were 'kept by everyone', including some she knew to be 'always in distress for money'.¹¹

As chief justice, John Pedder's social and professional status was secure. He nonetheless shared contemporaries' concerns about the cost of maintaining a lifestyle appropriate to his rank. In her analysis of colonial patronage appointments in the first half of the nineteenth century, Zoë Laidlaw demonstrates that many economic migrants proceeded to the colonies under the false impression that living expenses were lower than in Britain.¹² Like many fellow expatriates, Pedder soon found that this was not his experience. After only eighteen months in Van Diemen's Land, he complained of the 'inadequacy of my Salary to the expences [*sic*] of living here'.¹³ The high cost of living in Hobart Town was a common cause of complaint, as surveyor, George Frankland, observed in 1827:

The chief fault I find with the place is the excessive dearness of every thing except bread and meat. I do not believe there is a single merchant of respectability here, so that the public are at the mercy of a set of rascally retail dealers who form a sort of combination and make a profit of 200 per Cent on all English produce.¹⁴

⁹ Boyes to Mary Boyes, 10 January 1828, in P. Chapman (ed.), *Diaries and Letters of G.T.W.B. Boyes: Volume I, 1820-1832* (Melbourne, Oxford University Press, 1985), p. 274.

¹⁰ Ellen Viveash to Mrs Tanner, 26 January 1834, in P. Statham (ed.), *The Tanner Letters: A Pioneer Saga of Swan River and Tasmania* (Nedlands, University of Western Australia Press, 1981), p. 75. Original emphasis.

¹¹ Ellen Viveash to Mrs Tanner, 26 January 1834, in Statham, *The Tanner Letters*, p. 75.

¹² Z. Laidlaw, *Colonial Connections, 1815-45. Patronage, the Information Revolution and Colonial Government* (Manchester, Manchester University Press, 2005), p. 103.

¹³ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 275a, AJCP reel PRO 231.

¹⁴ Frankland to Hay, 15 August 1827, in G. Frankland, *Fives Letters from George Frankland in Van Diemen's Land, Privately Addressed to R.W. Hay of the Colonial Office* (Adelaide, Sullivan's Cove,

Pedder's application for an increase to his initial salary of £1,200 per annum was supported by Governor Arthur, who assured the Colonial Office that the judge's 'Salary has been very insufficient for his Station'.¹⁵ Writing officially to Robert Wilmot Horton at the Colonial Office in September 1825, Pedder respectfully observed that he was 'very unwilling to trouble' the undersecretary 'with a matter, which, for the most part, only regards myself personally'.¹⁶ He nonetheless 'venture[d] to hope' that his salary would 'be encreased [*sic*], to such an extent as to His Lordship may seem proper'.¹⁷ Privately, Pedder also assured Wilmot Horton that he had 'not made this request, until after experiencing the truth of the statement on which it is founded: Tho [*sic*] living in a very moderate manner and with a small establishment'.¹⁸ The chief justice unambiguously framed his request for a salary increase in a local cost-of-living context, noting diplomatically that, while it

would ill become me to make a comparison between my Salary and that of the Chief Justice of New South Wales, ... I can venture to say, that if the difference is founded ... upon the supposition, that the rate of living here is less expensive than at Sydney; I have reason to believe the contrary to be the fact.¹⁹

Bennett points out that the 'differential incomes' of the two chief justices were linked, not to the relative cost of living, but to precedence,²⁰ and, as David Duman has demonstrated, the hierarchy of the colonial judiciary was indeed reflected in remuneration rates.²¹ The senior judge in New South Wales received £2,000 per annum, significantly more than Pedder's initial salary of £1,200.²² However, when Pedder's salary was increased to £1,500 in 1826, Chief Justice

1997), p. 8.

¹⁵ Arthur to Wilmot Horton, 14 September 1825, *HRA* III, IV, p. 370.

¹⁶ Pedder to Wilmot Horton, 13 September 1825, CO 280/4, f. 270, AJCP reel PRO 231.

¹⁷ Pedder to Wilmot Horton, 13 September 1825, CO 280/4, f. 270, AJCP reel PRO 231.

¹⁸ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 275a, AJCP reel PRO 231.

¹⁹ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 275a, AJCP reel PRO 231.

²⁰ J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. 17.

²¹ D. Duman, *The English and Colonial Bars in the Nineteenth Century* (London, Croom Helm, 1983), p. 130.

²² Warrant of the Charter of Justice, *HRA* III, IV, p. 480.

Forbes did not receive a '*pro rata*' increase.²³ Pedder received no further increases, and his salary remained static at £1,500 per annum until his retirement in 1854. In a community where most government officials could augment their income from land, professional employment, or private business interests – and merchants often generated annual incomes in the tens of thousands of pounds – the chief justice was legislatively restricted to his official income, and whatever private investments he possessed. Having provided a 'reasonable' salary for the judge, the Charter of Justice of 1823 directed that 'no fee of Office Perquisite Emolument or Advantage whatsoever ... shall be accepted received or taken by such Chief Justice in any manner or any account or pretence whatsoever'.²⁴ Without these extra perquisites, Arthur again submitted to the Colonial Office in 1837, Pedder's salary was 'scarcely adequate to enable him to keep up the Appearances which are essential to his Office'.²⁵

An important aspect of keeping up appearances was an appropriate official residence. Under the Charter of Justice, the chief justice was entitled to 'occupy and inhabit any Official House or Residence' supplied by the colonial government 'without paying ... any Rent for the same and without being obliged to repair uphold or maintain any such House or Official Residence at his own costs and charges'.²⁶ In September 1823, as John and Maria Pedder were preparing to depart for Van Diemen's Land, the Secretary of State for the Colonies instructed Governor Arthur to 'make such arrangements as you may consider most expedient for providing a proper place of residence for the Chief Justice of the Colony'.²⁷ Lord Bathurst had anticipated the 'erection of Public Buildings for certain Public Officers', including the chief justice.²⁸ Instead, the

²³ Bathurst to Arthur, 21 April 1826, *HRA* III, V, p. 146; Bennett, *Sir John Pedder*, p. 17.

²⁴ Warrant of the Charter of Justice, 1823, *HRA* III, IV, pp. 480-481.

²⁵ Arthur to Glenelg, 2 November 1837, AOT GO1/1/29, f. 510, reel Z15.

²⁶ Warrant of the Charter of Justice, 1823, *HRA* III, IV, p. 480.

²⁷ Bathurst to Arthur, 9 September 1823, *HRA* III, IV, p. 87.

²⁸ Bathurst to Arthur, 9 September 1823, *HRA* III, IV, p. 87.

government entered into a series of rental agreements with colonial landlords. Chief Justice Pedder occupied three official residences: a two-storey house in Macquarie Street; and the villas *Secheron*, in Battery Point; and *Newlands*, outside the town boundary, at semi-rural New Town.²⁹ After his resignation, Pedder returned temporarily to Macquarie Street, occupying his only private colonial residence in 1855-1856. As illustrated in the map below, Pedder's first official residence was located within a short distance of the brick and sandstone buildings which encompassed his public world: Hobart Town Gaol, St David's church, the courthouse, and Government House.

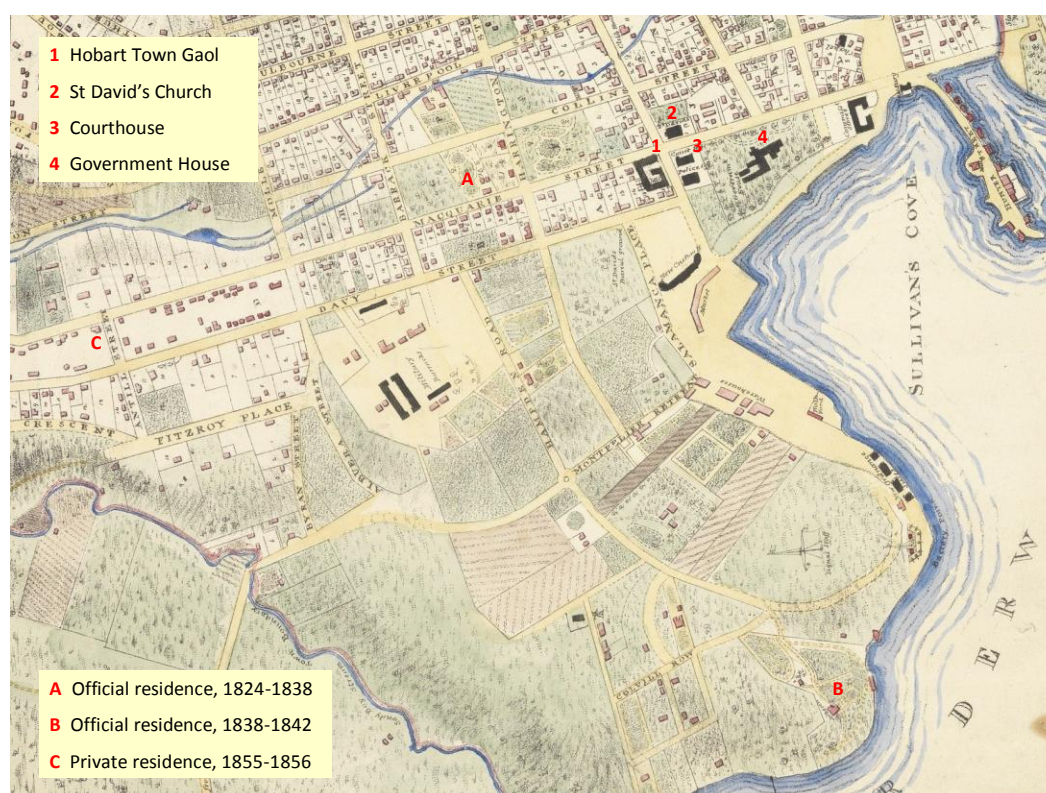


Figure 10: Hobart Town, c. 1839.³⁰

Section showing the location of Pedder's first two official residences in relation to his places of work.

Image reproduced courtesy of the Allport Library and Museum of Fine Arts,
Tasmanian Archive and Heritage Office

²⁹ *Secheron* and *Newlands* survive, as a private home and a reception centre.

³⁰ G. Frankland, Hobart [section], Allport Library and Museum of Fine Arts, TAHO. Full image available online at <<http://catalogue.statelibrary.tas.gov.au/item/?id=548683>> accessed 30 October 2011.

From 1824 until 1838, the Macquarie Street house was rented from Anglo-Irish entrepreneur, R.W. Loane, who derived substantial income from letting his many properties in Hobart Town and Sydney to the government.³¹ Built by 1822, the whitewashed house comprised cellars, a kitchen and store, a study, bedrooms, and a sitting and drawing room; by 1830, all were in need of repair.³² Outbuildings included a gig house, privies, and a 'skilling' [lean-to], and the garden was surrounded by a 'trellised fence'.³³ Macquarie Street was one of the 'principal streets' of Hobart Town, and contained 'most of the public buildings and the houses of official persons'.³⁴ Colonial diarist, George Boyes, described the streetscape as the Pedders would have known it in the 1820s:

The houses ... are neat and handsome, generally of two stories and either whitened or in red brick, they are placed at some distance apart, and the intervening spaces are filled up with sweet Briar Hedges, Rose Trees, abundance of Stocks – and Wall Flowers, Geraniums and vines, all growing up together with some of the Native Evergreens in the greatest abundance.³⁵

A section from Augustus Earle's water colour panorama of Hobart Town, below, illustrates the vicinity of the Pedders' first colonial home as it appeared in the mid-1820s. A handwritten key identifies buildings in Macquarie Street, including the whitewashed, two-storey 'Judge's Residence' (labelled 8, centre left) and the gaol, church and courthouse (labelled 5, 2, and 1, far right).³⁶

³¹ AOT Correspondence File, R.W. Loane, Query No. 1359; F.C. Green, 'Loane, Roland Walpole (-1844)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020107b.htm>> accessed 2 December 2009.

³² J.L. Archer, 'Report of Repairs required to be done at the residence of His Honor [*sic*] the Chief Justice', 17 November 1830, AOT CS01/1/37/639, ff. 17-18, reel Z1762.

³³ Archer, 'Report of Repairs', 17 November 1830, CS01/1/37/639, ff. 17-18, reel Z1762.

³⁴ A. Prinsep, *The Journal of a Voyage from Calcutta to Van Diemen's Land: Comprising a Description of that Colony during a Six Months' Residence, from Original Letters Selected by Mrs. A. Prinsep; and, Illustrations to Prinsep's Journal of a Voyage from Calcutta to Van Diemen's Land from Original Sketches taken during the Years 1829 and 1830* (Hobart, Melanie Publications, 1981; originally published London, Smith, Elder & Co., 1833), p. 60.

³⁵ Boyes to Mary Boyes, 9 November 1826, in Chapman, *Diaries and Letters of G.T.W.B. Boyes*, p. 267.

³⁶ 'Panorama of Hobart, c. 1825 – water colour drawings by Augustus Earle', Dixon Galleries, State Library of New South Wales [DGD 14]. A low resolution image is available online at



Figure 11: 'Panorama of Hobart, c. 1825 – water colour drawings by Augustus Earle',
Dixson Galleries, State Library of New South Wales [DGD 14].
Section showing the 'Judge's Residence' (labelled 8), Pedder's official residence, 1824-1838.
Image reproduced courtesy of the State Library of New South Wales

Echoing Boyes' contemporary description, Henry Savery's satirical *Hermit in Van Diemen's Land* imagines the Pedders' Macquarie Street home as a 'large commodious looking stuccoed building', containing a drawing room 'of tolerable dimensions, in the ornaments and furniture of which, were sufficient instances of good taste and elegance, to denote that a Lady presided in the house'.³⁷ On their departure from England in 1823, John and Maria Pedder had been given permission to ship twelve 'Tons of Baggage' aboard the *Hibernia* at Navy Office expense.³⁸ This probably included a variety of household and personal items,

<<http://acms.sl.nsw.gov.au/item/itemDetailPaged.aspx?itemID=447957>> accessed 2 May 2011.

³⁷ C. Hadgraft, and M. Roe (eds.), Henry Savery, *The Hermit in Van Diemen's Land* (St Lucia, University of Queensland Press, 1964), p. 74.

³⁸ Wilmot Horton to Pedder, 30 September 1823, CO 202/11, f. 240, AJCP reel PRO 216; Richard Penn to Pedder, 20 September 1823, CO 202/11, f. 225, AJCP reel PRO 216.

including furniture, as well as Pedder's law library.³⁹ During their colonial residence, the Pedders also regularly imported luxury items, as in 1846, when a piano ordered from London arrived aboard the *Cygnets*.⁴⁰

Auction notices published in the lead-up to Pedder's return to England in 1856 not only provide a vivid glimpse of the material culture of the colonial elite, but also Pedder's particular taste and interests as these were reflected in his household contents. Among the assortment of items which he chose not to transport to England were 'books, choice wines, silver plate and plated ware, rare engravings, china, glass, cutlery, harness, saddlery, agricultural and horticultural implements, and a great variety of valuable effects'.⁴¹ Further 'household furniture and effects, comprising, tables, chairs, couches, carpets, bedsteads, bedding, wash-stands, glass-ware, crockery, kitchen utensils, and various articles of convenience and necessity', were later offered for sale, along with a 'small quantity of plate'.⁴²

Pedder's salary package included £250 per annum for rent. This sum was published in the annual estimates, and exploited by colonial landlords. Indeed, in the thirty years from 1824, £250 was 'always paid' for 'every house' Pedder occupied.⁴³ In lease negotiations, government officials begrudgingly met owners' demands for the full amount. In 1831, for example, Pedder was aware that his landlord's agent was driving 'too hard a bargain', and hoped that Governor Arthur had not been thrown into 'perplexity' by the negotiations.⁴⁴ Similarly, when renewing the lease on *Newlands* in 1847, Colonial Secretary, James

³⁹ Pedder's professional library included 'Statutes at large for the use of the Courts at Van Diemen's Land' and 'Books of Practice', which were 'to be provided at [his] own expence [*sic*]'. Wilmot Horton to Pedder, 20 September 1823, CO 202/11, f. 223, AJCP reel PRO 216.

⁴⁰ *Courier*, 11 November 1846, p. 2.

⁴¹ *Courier*, 3 March 1855, p. 3.

⁴² *Courier*, 30 January 1856, p. 1.

⁴³ Pedder to Bicheno, 20 February 1847, AOT CSO20/1/26, No. 565, f. 93.

⁴⁴ Pedder to Arthur, 6 June 1831, Arthur Papers, vol. 9, ML ZA 2169. See also Pedder to Arthur, 23 April 1831 and 1 June 1831, Arthur Papers, vol. 9, ML ZA 2169.

Bicheno protested that the landlord was 'taking advantage of our necessities', but submitted to his demands, acknowledging that it would be 'a more serious injury and annoyance to the Chief Justice to deprive him of his house'.⁴⁵ Pedder certainly did not relish the prospect of giving up the house: as he complained to Bicheno, 'I have already suffered the inconvenience and loss of two removes and wish to avoid a third'.⁴⁶

Deficiencies in the standard of housing and delays with repairs are recurring themes in correspondence relating to Pedder's official residences. In 1830, the colonial architect reported that the Macquarie Street house was 'damp and very much out of order'.⁴⁷ Disputes between the government and Loane (or his agent, Mr Kinsman) about the necessity and cost of repairs continued into the 1830s, as did Pedder's concerns about the 'very bad and unsafe condition' of the house.⁴⁸ Complaining that the front of the house was 'considerably not on the perpendicular', Pedder informed Arthur that 'I should dread much to place my family in it' without an assurance from the colonial engineer that 'it should be safe to do so'.⁴⁹

Pedder's family faced unexpected danger in the house in 1832, in the form of fire. On a Monday evening in July, a fire in the chimney flue of the dining room caused significant damage to the main house.⁵⁰ The *Hobart Town Courier*

⁴⁵ Annotation to Pedder to Bicheno, 20 February 1847, CS020/1/26, No. 565, f. 93.

⁴⁶ Pedder to Bicheno, 20 February 1847, CS020/1/26, No. 565, f. 94.

⁴⁷ Archer, 'Report of Repairs', 17 November 1830, CS01/1/37/639, ff. 17-18, reel Z1762. Loane built several houses in Hobart Town between 1818 and 1822. In 1825, he had suggested another of his houses (*Belle Vue*, now in Fitzroy Place) as better suited as a 'Judge's residence, being very spacious and a delightful situation'. Loane to Arthur, 12 April 1825, CS01/1/37/639, ff. 3-4, reel Z1762.

⁴⁸ Pedder to Arthur, 1 June 1831, Arthur Papers, vol. 9, ML ZA 2169; Memo to 'Engineer's Report upon the Repairs at the Chief Justice's House', 19 November 1830, CS01/1/37/639, f. 10, reel Z1762.

⁴⁹ Pedder to Arthur, 12 December 1831, CS01/1/37/639, f. 79, reel Z1762.

⁵⁰ Reports of the fire on 30 July appeared in the press a few days later. *Hobart Town Courier*, 3 August 1832, p. 2. A slightly different version, reprinted from the *Tasmanian* of 3 August 1832, appeared in the *Sydney Gazette*, 21 August 1832, p. 4.

reported that the fire was ‘not fairly extinguished until much damage was done to the furniture and several of the best rooms drenched with water’.⁵¹ The ‘greatest praise is due to all parties who assisted’, declared the *Courier*.⁵² Soldiers from the 63rd Regiment joined with local inhabitants, including convicts, to extinguish the fire in ‘the most prompt and efficient manner, and with the help of the fire engine’.⁵³ While the Pedders’ dining room was ‘inundated with water’ and the ‘best bedroom and dressing room’ were damaged, ‘the flames were timely subdued, else much more damage would doubtless have been done’.⁵⁴ Contrasting the efforts to save the Pedders’ home with the ‘pilfering’ which often attended house fires in England, the *Courier* observed pointedly that

what will surprise our readers at home, and especially the prison discipline committee, who fancy that transportation is no punishment, or means of criminal reform is the fact, that there was not the slightest attempt at theiving [*sic*] ... although numerous prisoners were at hand and assisting throughout.⁵⁵

Occurring only two nights after a fire in the nearby home of solicitor, George Cartwright, the *Courier* report offered a sobering reminder ‘of those awful calamities by fire, to which we are all so liable in this place’.⁵⁶

With the lease on Pedder’s Macquarie Street residence due for renewal in 1838, Colonial Engineer, John Lee Archer, inspected the premises. While Archer did not share Pedder’s fears about the structural integrity of the house, he did concede that, ‘from the slight nature of the building it is much affected by heavy

⁵¹ *Hobart Town Courier*, 3 August 1832, p. 2.

⁵² *Hobart Town Courier*, 3 August 1832, p. 2.

⁵³ *Hobart Town Courier*, 3 August 1832, p. 2.

⁵⁴ Brown to Archer, 1 August 1832, CS01/1/37/639, f. 86, reel Z1762; *Hobart Town Courier*, 3 August 1832, p. 2.

⁵⁵ *Hobart Town Courier*, 3 August 1832, p. 2.

⁵⁶ *Hobart Town Courier*, 3 August 1832, p. 2. Cartwright’s house sustained damage estimated at £200.

gusts of Wind', and recommended finding 'a more substantial House for His Honor's [*sic*] residence'.⁵⁷ In May 1838, Pedder told the colonial secretary that 'I do not desire to leave this house provided I can be assured that it is a safe residence and that it may have such repairs as are necessary to make it a tolerably comfortable one'.⁵⁸ At the beginning of August, however, he reported that he had tried in vain 'to find a residence which I could propose to the government to rent for me'.⁵⁹

A week later, the government invited tenders 'for a house suitable for the residence of His Honor [*sic*], the Chief Justice'.⁶⁰ Several houses in Battery Point and Hobart Town were submitted for consideration; the successful tender came from the Surveyor-General, George Frankland. Having failed to sell his 'elegant, substantial, and gentlemanly' villa, *Secheron*, at auction in January,⁶¹ Frankland wrote to the colonial secretary on the 'understanding that the Govt. [*sic*] requires a Residence for the Chief Justice'.⁶² He proposed a lease 'for a period of five years, at a rental of Two hundred and fifty pounds payable quarterly'.⁶³

Designed and built by Frankland in 1831, *Secheron* was located on Battery Point. This area of 'rising ground which borders the wharf' was acknowledged by contemporaries as 'one of the most charming and fashionable places of residence' in the colony.⁶⁴ Frankland had named his estate after Secheron Point

⁵⁷ Archer to the Colonial Secretary, 11 June 1838, AOT CS05/1/84/1861, f. 143, reel Z1987.

⁵⁸ Pedder to the Colonial Secretary, 26 May 1838, CS05/1/84/1861, f. 141, reel Z1987.

⁵⁹ Pedder to the Colonial Secretary, 2 August 1838, CS05/1/84/1861, f. 153, reel Z1987.

⁶⁰ *Hobart Town Courier*, 10 August 1838, p. 2.

⁶¹ The villa was offered for auction on 21 January 1838. Frankland had previously advertised the residence, and allotments subdivided from the estate, for sale or lease. *Hobart Town Courier*, 5 January 1838, p. 3; *Hobart Town Courier*, 4 November 1836, p. 3; 20 October 1837, p. 1; and 27 October 1837, p. 1.

⁶² Frankland to Montagu, 1 September 1838, AOT CS05/1/145/3535, f. 232, reel Z2005.

⁶³ Frankland to Montagu, 1 September 1838, CS05/1/145/3535, f. 232, reel Z2005. Frankland had already advertised unsuccessfully for a three-year lease. *Hobart Town Courier*, 20 October 1837, p. 1.

⁶⁴ [no author], *The Heritage of Tasmania: The Illustrated Register of the National Estate* (Melbourne, Macmillan, 1983), p. 33.

on Lake Geneva for the similarity of the vistas.⁶⁵ Indeed, of his first impressions of Hobart Town in 1827, Frankland had declared that it 'resembled a remote watering-place in England, placed by the side of a Swiss lake'.⁶⁶ Several months before the house was proposed for the chief justice, an auction notice enthused that the villa was 'seated on a sublime eminence ... commanding views probably unequalled in a country, which for picturesque scenery, stands pre-eminent'.⁶⁷ Moreover, the auctioneers declared, the estate had the advantage of 'approximating a neighbourhood of the most select society, within easy approach of a large and populous town'.⁶⁸

The estate offered to Pedder in September 1838 encompassed 'six acres of land with a frontage of five hundred feet on the Derwent'.⁶⁹ As illustrated in the plan below, *Secheron* was 'bounded in front' by the river, but 'screened from the more boisterous gale' by 'its own thriving plantations'.⁷⁰ The grounds, the auction notice recited, had been 'laid out with much taste, and every attention paid to the fruit and kitchen gardens'.⁷¹ Inside the house, the 'entrance Hall, Drawing, Dining and Bed Rooms' were 'all well proportioned and handsomely finished', while the 'minor apartments and servants' offices' showed that 'convenience ha[d] been studied rather than expense'.⁷²

⁶⁵ A. Rowntree, *Battery Point Today and Yesterday* (Hobart, Adult Education Board of Tasmania, 1968), p. 36.

⁶⁶ Frankland to Hay, 15 August 1827, in Frankland, *Five Letters*, pp. 8-9.

⁶⁷ *Hobart Town Courier*, 5 January 1838, p. 3.

⁶⁸ *Hobart Town Courier*, 5 January 1838, p. 3.

⁶⁹ Frankland to Montagu, 1 September 1838, CS05/1/145/3535, f. 232, reel Z2005.

⁷⁰ *Hobart Town Courier*, 5 January 1838, p. 3.

⁷¹ *Hobart Town Courier*, 5 January 1838, p. 3.

⁷² *Hobart Town Courier*, 5 January 1838, p. 3.



Figure 12: Plan of the *Secheron* estate, Pedder's official residence, 1838-1842.⁷³

Image reproduced courtesy of the Tasmanian Archive and Heritage Office

Though fearing he should be left 'homeless' at the end of the Macquarie Street lease, Pedder was initially reluctant to move to *Secheron*.⁷⁴ Despite the auctioneers' assurance that 'a more gentlemanly and comfortable residence is

⁷³ Plan showing *Secheron Estate*, Battery Point with partial subdivision, AOT NS596/1/1. The section showing the proposed subdivision is not reproduced here.

⁷⁴ Pedder to Montagu, 6 September 1838, CS05/1/145, No. 3535, f. 231, reel Z2005.

not to be met with', Pedder only agreed to accept the house on condition that Frankland attended to 'all the painting varnishing plastering and white washing'.⁷⁵ As the chief justice insisted to the colonial secretary, 'It cannot be expected that I should go into a place not in a tenantable state of repair'.⁷⁶ After some delay, John and Maria Pedder occupied *Secheron*, their second colonial home, between 1838 and 1842.⁷⁷

Emphasising an association which adds to the prestige and historical significance of particular colonial buildings, local histories often assert that Chief Justice Pedder was the owner of both *Secheron* and his subsequent home, *Newlands*.⁷⁸ Connection with the chief justice was similarly exploited by colonial auctioneers in their advertisements. Auction notices in the Van Diemen's Land press provide a vivid, if predictably overstated, description of *Newlands* as it was 'in the occupation of Sir John Lewes Pedder'.⁷⁹ Describing the 'princely Mansion, Premises, Garden and surrounding enclosures' as 'one of the most complete establishments in the hemisphere', Messrs Lowes and MacMichael informed 'Trustees and Capitalists requiring undeniable security and punctual return for an investment' that the 'present lessee adds annually to its value by constant additions and improvements'.⁸⁰ Sir John, the auctioneers adverted, occupied the estate under a seven-year lease 'at an annual rental of £250, payable half-yearly'.⁸¹ By contrast, the Colonial Architect, William Porden Kay, considered that 'the house though large' was not 'commodious or adapted for a large establishment' and 'could never ... command that rent' on the open

⁷⁵ *Hobart Town Courier*, 5 January 1838, p. 3; Pedder to Montagu, 6 September 1838, CS05/1/145, No. 3535, f. 229, reel Z2005.

⁷⁶ Pedder to Montagu, 6 September 1838, CS05/1/145, No. 3535, f. 229, reel Z2005.

⁷⁷ Mason to Montagu, 10 September 1840, CS05/1/145, No. 3535, f. 235, reel Z2005. Mason's letter indicates that the lease began on 1 October 1838, but Pedder did not 'take possession of the Premises until some weeks afterwards'.

⁷⁸ Rowntree, *Battery Point Today and Yesterday*, p. 38; *Tasmanian Mail*, 25 June 1924, p. 54.

⁷⁹ *Courier*, 29 September 1847, p. 2.

⁸⁰ *Courier*, 29 September 1847, p. 2.

⁸¹ *Courier*, 29 September 1847, p. 2. In October, *Newlands* was 'bought in at the price of £3,200'. *Courier*, 13 October 1847, p. 2.

market.⁸²

The move to *Newlands* further increased Pedder's physical and psychological distance from the sites of his official life and the linear streetscape of the town, and illustrates the 'broader political, economic and cultural connotations' of these different colonial landscapes.⁸³ Home to 'many of the wealthier merchants, government officers, and professional men', the 'pretty village of New Town' was 'remarkable for its elegant and picturesque villas'.⁸⁴ *Newlands* was described as 'substantially built and delightfully situated, at a distance of only a mile and a half from Hobart Town', along a 'macadamised' road.⁸⁵ Set on 29 acres, the house was 'situated on the rising ground overlooking the whole expanse of New Town, with its magnificent and much admired scenery'.⁸⁶ By the time of the Pedders' move to the estate, the gardens of New Town had acquired a reputation for being 'remarkably prolific'.⁸⁷ *Newlands* boasted an 'ornamental plantation and shrubbery, with lawn and flower garden', while the 'rich and productive soil' supported a kitchen garden said to abound in 'choice Fruit Trees and excellent Vegetables'.⁸⁸ John and Maria Pedder's shared interest in horticulture thrived in the semi-rural setting of *Newlands*.

⁸² Kay to Bicheno, 29 May 1846, AOT CSO20/1/26, No. 565, f. 89. A nephew of Sir John Franklin, Kay held various colonial appointments, including Director of Public Works, and designed the present, neo-Gothic Government House (1853-1858). H. Preston, 'Kay, William Porden (1809-1870?)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020032b.htm>> accessed 9 October 2009.

⁸³ Moskowitz, 'Backyards and beyond', p. 72.

⁸⁴ L.A. Meredith, *My Home in Tasmania: or, Nine Years in Australia* (London, John Murray, 1852), p. 25; D. Burn, *A Picture of Van Diemen's Land by David Burn. A Facsimile of a Work Published in 'The Colonial Magazine', 1840-41* (Hobart, Cat & Fiddle Press, 1973), p. 54.

⁸⁵ *Courier*, 26 May 1855, p. 1.

⁸⁶ *Courier*, 26 May 1855, p. 1.

⁸⁷ Burn, *A Picture of Van Diemen's Land*, p. 55.

⁸⁸ *Courier*, 26 May 1855, p. 1.



Figure 13: J.S. Prout, 'New Town, Mount Direction &c. from Newlands', 1844.⁸⁹
Image reproduced courtesy of the Allport Library and Museum of Fine Arts,
Tasmanian Archive and Heritage Office

Sir John was elected a founding fellow of the Botanical and Horticultural Society of Van Diemen's Land at its inaugural meeting on 14 October 1843.⁹⁰ This precursor of the Royal Society of Van Diemen's Land/Tasmania was established by the new lieutenant-governor, Sir John Eardley-Wilmot, to administer the Colonial Gardens (now the Royal Tasmanian Botanical Gardens). The society also aimed to 'develope [*sic*] the physical character of the Island, and illustrate its natural history and productions'.⁹¹ During its first few years, members also

⁸⁹ Coloured lithograph, published in Hobart Town by T. Bluett, 1844, Allport Library and Museum of Fine Arts,
<<http://catalogue.statelibrary.tas.gov.au/item/?q=newlands&format=Images&avail=Online&i=2&id=100906>> accessed 8 October 2009.

⁹⁰ 'Nominal list of fellows of the Botanical and Horticultural Society of Van Diemen's Land, instituted 14 October 1843', University of Tasmania Special Collections, Royal Society of Tasmania Library Collection, RSA/C/1.

⁹¹ 'Rules and regulations of the Botanical and Horticultural Society of Van Diemen's Land', RSA/C/1.

organised horticultural shows; however, this function was soon abandoned.⁹² Membership comprised most of the senior government officials, professionals, landowners and merchants.⁹³ Under the society's rules, ladies were eligible for admissions 'as Fellows upon the same terms, [and] with the same privileges ... as Gentlemen'.⁹⁴ These privileges initially included admission to the Colonial Gardens, and 'free plants and cuttings' introduced to the island through from the society's 'international and intercolonial' plant and seed exchanges.⁹⁵

Lady Pedder does not appear to have sought admission to the Botanical and Horticultural Society, but was among the handful of female members of the Gardeners' and Amateurs' Horticultural Society, Hobart Town.⁹⁶ During the 1840s, John and Maria Pedder were both active contributors to this society's competitive exhibitions, and were regularly rewarded with prize medals. Lady Pedder received accolades for her floral arrangements, fruit and wine; Sir John for his vegetables and cut flowers, including roses and Sweet Williams.⁹⁷ In an era before the formal establishment of acclimatisation societies in Tasmania,⁹⁸ the activities of the Gardeners' and Amateurs' Horticultural Society highlighted

⁹² G. Winter, 'The foundation years of the Royal Society of Tasmania', *Papers and Proceedings of the Royal Society of Tasmania* 127 (1993), pp. 61, 62; E.L. Piesse, 'The foundation and early work of the Society; with some account of earlier institutions in Tasmania', *Papers and Proceedings of the Royal Society of Tasmania* (1913), p. 145.

⁹³ 'Nominal list of fellows of the Botanical and Horticultural Society', RSA/C/1.

⁹⁴ 'Rules and regulations of the Botanical and Horticultural Society', RSA/C/1; Winter, 'The foundation years of the Royal Society of Tasmania', p. 62.

⁹⁵ Winter, 'The foundation years of the Royal Society of Tasmania', pp. 61, 62, 65.

⁹⁶ *Sixth Report of the Gardeners' and Amateurs' Horticultural Society, Hobart Town* (Hobart Town, J. Burnett, 1851), pp. 7-8. The governor's wife, Lady Denison, was also a member.

⁹⁷ *Courier*, 6 December 1845, p. 3; 21 March 1846, p. 2; 5 December 1846, p. 2; 17 April 1847, p. 3; 8 December 1847, p. 3; and 11 December 1847, p. 4; *Launceston Examiner*, 14 December 1844, p. 6.

⁹⁸ cf. The Tasmanian Acclimatisation Society, founded 1862; the Tasmanian Game Protection and Acclimatisation Society (1895); and the Northern Tasmanian Acclimatisation Society (1899). S. Petrow, 'Tasmanian acclimatisation societies' in A. Alexander (ed.), *The Companion to Tasmanian History* (Hobart, Centre for Tasmanian Historical Studies, 2006), online edition, <http://www.utas.edu.au/library/companion_to_tasmanian_history/T/Tas%20acc%20societies.htm> accessed 7 October 2011.

the 'rapid advance of horticultural skill in Van Diemen's Land'.⁹⁹ Press reports of the society's seasonal shows also provide valuable insights into the success of experimental commercial crops, including grapes, millet, and flax.¹⁰⁰ Similarly, the exhibition of 'culinary vegetables' and fruit sheds light on the seasonal diet of the colonists.¹⁰¹ The Pedders, for example, enjoyed Black Rock potatoes, Ribstone Pippin table apples, Blue Scimitar peas, and Ripe Gooseberry wine.¹⁰²

It is likely that Pedder's heavy official workload limited his time in the garden, and he employed gardeners throughout his colonial residence. Prize lists of the Gardeners' and Amateurs' Horticultural Society occasionally indicate that an exhibit was 'from the garden of Sir J.L. Pedder' or 'the gardener of Sir J.L. Pedder'.¹⁰³ In the 1830s, Pedder's assigned convict servants included William Sanderson, a gardener from Surrey,¹⁰⁴ while, in 1848, he advertised for a gardener 'who knows his business'.¹⁰⁵ Competing against professional gardeners and nurserymen, such as the Lipscombe brothers,¹⁰⁶ Sir John was among other 'amateur' gardeners like solicitor, Joseph Allport, an 'ardent horticulturist with extensive gardens and orchards', who also shared a love of gardening with his wife, artist Mary Morton Allport.¹⁰⁷

⁹⁹ *Courier*, 17 April 1847, p. 2.

¹⁰⁰ *Courier*, 13 February 1847, p. 2.

¹⁰¹ *Courier*, 13 February 1847, p. 2.

¹⁰² *Courier*, 21 March 1846, p. 2; 5 December 1846, p. 2; 17 April 1847, p. 3.

¹⁰³ *Courier*, 13 February 1847, pp. 2, 3; 11 October 1848, p. 4.

¹⁰⁴ Description list, William Sanderson, AOT CON18/1/14, f. 267, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON18-1-14,244,141,F,44> accessed 1 October 2011; *Hobart Town Courier*, 13 January 1837, p. 4.

¹⁰⁵ *Courier*, 8 March 1848, p. 1. See also *Courier*, 1 March 1845, p. 3, and 9 July 1845, p. 1.

¹⁰⁶ A. Cripps, 'Gardens and Gardeners' in Alexander, *Companion to Tasmanian History*, <http://www.utas.edu.au/library/companion_to_tasmanian_history/G/Gardens%20and%20Gardeners.htm> accessed 7 October 2009. Frederick Lipscombe owned nurseries in Sandy Bay, published a 'Gardener's Kalendar', and offered a garden design service.

¹⁰⁷ H. Allport, 'Allport, Joseph (1800-1877)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010011b.htm>>; G. Winter, 'Mary Morton Allport' in Alexander, *Companion to Tasmanian History*, <http://www.utas.edu.au/library/companion_to_tasmanian_history/A/Mary%20Morton%20Allport.htm> accessed 7 October 2009.

In an era when gardening encompassed a moral dimension, the Gardeners' and Amateurs' Horticultural Society also sought to increase public interest in gardening as a corrective to vice. As the committee explained in its annual report of 1851, 'floriculture' constituted a 'primitive source of innocent, rational enjoyment', which its members 'hope[d] to see extended to every cottage and every individual in the colony'.¹⁰⁸ Extolling the 'cultivation of flowers' as a worthy alternative to 'seeking pleasure in grovelling and irrational pursuits', the Gardeners and Amateurs firmly believed that 'nothing tends in a greater degree to elevate the moral standard of our cottager and our artizan [sic] than a taste for this enjoyment'.¹⁰⁹ The example and practical support of 'distinguished individuals' was essential to fostering the society's aims:¹¹⁰ with Governor and Lady Denison, Sir John and Lady Pedder were valuable role models. Pedder's ongoing participation in the seasonal garden shows also illustrates his genuine passion for gardening and suggests that his garden at *Newlands* offered a vital refuge from the pressures of his official career.

Writing in the 1840s, colonial commentator David Burn observed that, 'With by far the largest proportion of emigrants, the acquisition of land – a *territorial possession* – is the alpha and omega of all their aims'.¹¹¹ In contrast to most imperial careerists and free settler-colonists in Van Diemen's Land, Chief Justice Pedder was excluded, under the Charter of Justice of 1823, from receiving any 'emolument' beyond his salary and official residence.¹¹² This George Arthur interpreted to include the free grants of Crown land made available under a

¹⁰⁸ *Sixth Report of the Gardeners' and Amateurs' Horticultural Society*, p. 4.

¹⁰⁹ *Sixth Report of the Gardeners' and Amateurs' Horticultural Society*, p. 4.

¹¹⁰ *Sixth Report of the Gardeners' and Amateurs' Horticultural Society*, p. 4.

¹¹¹ Burn, *A Picture of Van Diemen's Land*, p. 182. Original emphasis.

¹¹² Arthur to Glenelg, 2 November 1837, AOT G01/1/29, ff. 508-509, reel Z15; Warrant of the Charter of Justice, HRA III, IV, pp. 480-481. In spite of this provision, Chief Justice Forbes of New South Wales was granted 120 acres at Emu Plains and a further 2560 acres in the Upper Hunter Valley. C.H. Currey, 'Forbes, Sir Francis (1784-1841)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010366b.htm>> accessed 7 October 2009.

policy which was discontinued in 1831.¹¹³ Writing to the Colonial Office on his return to England in 1837, however, the former governor deeply regretted that his friend's interests had 'suffered from what he now apprehends to have been an erroneous construction on his part of the terms of the Charter'.¹¹⁴ Arthur sought to remedy this 'injustice', but the Secretary of State for the Colonies declined to 'entertain an application for a Grant of Land brought forward for the first time so long after the period at which Grants had ceased to be made, and when they had been so generally refused to other Individuals'.¹¹⁵ With no prospect of obtaining land in Van Diemen's Land, Pedder turned his attention to the speculative settlement of Port Phillip.

Having become 'infected with the Port Phillip mania', colonists from Van Diemen's Land – including enterprising family friends and Port Phillip Association members, James Simpson, Thomas Bannister and John Helder Wedge – sought land and prosperity across Bass Strait in the 1830s and 1840s.¹¹⁶ With Simpson as his agent, Pedder vicariously joined the 'overstraiters' as an 'absentee speculator'.¹¹⁷ In 1836, he sent a flock of sheep to Port Phillip, possibly with John Helder Wedge, who arrived in May with 2,600 sheep. Fellow overstraiter, George Armytage, later recalled that sheep were 'left

¹¹³ With the introduction of the Ripon Regulations in 1831, Crown land was sold at a fixed price (initially 5 shillings an acre). Government Order, 1 July 1831, *HRA* I, XVI, pp. 850-851, n. 25.

¹¹⁴ Glenelg to Franklin, 12 April 1838, CO 408/14, f. 385, AJCP reel PRO 881; Arthur to Glenelg, 2 November 1837, AOT G01/1/29, f. 510, reel Z15. Charles Grant, Baron Glenelg (1778-1866), Secretary of State for the Colonies, 1835-1839.

¹¹⁵ Glenelg to Franklin, 12 April 1838, CO 408/14, ff. 385-386, AJCP reel PRO 881. According to Arthur, Pedder 'never applied officially for a Grant in the Interior, or even for a Town or Suburban Allotment'. Arthur to Glenelg, 2 November 1837, G01/1/29, f. 508, reel Z15.

¹¹⁶ Arthur to Glenelg, 23 April 1836, AOT G033/1/22, No. 42, f. 170, reel Z440. Arthur attributed Simpson's resignation from civil appointment in Van Diemen's Land to this 'mania'. Wedge also resigned from the Surveyor-General's Department when he was refused 'a month's leave of absence'. Frankland to Hay, 21 October 1835, CO 280/61, ff. 4a-5, AJCP reel PRO 266.

¹¹⁷ S. Macintyre, *A Concise History of Australia*, 2nd edn. (Cambridge, Cambridge University Press, 2004), p. 76; A.G.L. Shaw, 'Vandemonian influences on the Port Philip District, 1834-50', *Bulletin of the Centre for Tasmanian Historical Studies* 2 (2) (1989-90), p. 21; J. Boyce, *1835: The Founding of Melbourne and the Conquest of Australia* (Melbourne, Black Inc., 2011), pp. 122, 228-229, n. 16; McCallum, 'Simpson, James (1792?-1857)', *Australian Dictionary of Biography*.

in the charge of shepherds near the beach [at Williamstown] until suitable runs could be procured'.¹¹⁸ When several of Armytage's shepherds were killed by Aboriginal people, his sheep 'were put into a flock of Judge Pedder's, in charge of Mr [Charles] Darke' – Wedge's nephew.¹¹⁹

Licences for pastoral runs on Crown land in the Port Phillip District were allocated from 1838, and, from 1847, licence-holders were required to lodge applications for leases on the runs in their occupation.¹²⁰ Between 1838 and 1855, Pedder held a 15,000-acre pastoral run with a carrying capacity of 5,000 sheep, near Mount Blackwood in the Western Port District.¹²¹ Pedder's name also appears among the owners of the 'many estates belonging to Tasmanian colonists' illustrated in Thomas Ham's engraved map of Australia Felix (western Victoria), published in Melbourne in 1847.¹²² This map shows that Pedder held a further pastoral run 'in the county of Bourke' to the south-west of Melbourne.¹²³ Pedder's Port Phillip interests also included stock licences at Western Port and Portland Bay.¹²⁴

¹¹⁸ George Armytage, 6 October 1853, in T.F. Bride (ed.), *Letters from Victorian Pioneers: Being a Series of Papers on the Early Occupation of the Colony, the Aborigines, etc., Addressed by Victorian Pioneers to His Excellency Charles Joseph La Trobe, Esq., Lieutenant Governor of the Colony of Victoria* (Melbourne, Heinemann, 1969), p. 172.

¹¹⁹ George Armytage, 6 October 1853, in Bride, *Letters from Victorian Pioneers*, p. 173.

¹²⁰ R.V. Billis and A.S. Kenyon, *Pastoral Pioneers of Port Phillip* (Melbourne, Stockland Press, 1974), p. vii. The leasehold system was introduced by an imperial Order-in-Council dated 9 March 1847. For Pedder's applications for lease 'No. 152', see *Supplement to the New South Wales Government Gazette*, 21 October 1847, p. 1526; *Melbourne Argus*, 25 April 1848, p. 1; *Argus*, 3 October 1848, p. 4.

¹²¹ Pedder sold this lease in August 1855. Originally called *Cupumninip*, it was renamed *Glen Pedder* by the new owner. Billis and Kenyon, *Pastoral Pioneers of Port Phillip*, pp. 124, 197; *The Squatters' Directory, Containing a List of All the Occupants of Crown Lands, in the Intermediate and Unsettled Districts of Port Phillip, the Names, Estimated Areas, and Grazing Capabilities, of their Respective Runs, with the Commissioner's District in which they are situated; Compiled from the Government Gazette and Arranged Alphabetically* (Melbourne, Edward Wilson, 1849), p. 16.

¹²² *Courier*, 17 April 1847, p. 2.

¹²³ This run is numbered 64. T. Ham, *Key to the Map of Australia Felix, and Its Squatting Districts* (Melbourne, Thomas Ham, 1847), p. 4, National Library of Australia, Digital Collections, Maps, <<http://nla.gov.au/nla.map-rm1295>> accessed 7 October 2009.

¹²⁴ *Sydney Monitor and Commercial Advertiser*, 12 March 1841, p. 2; Bennett, *Sir John Pedder*, p. 113; Boyce, 1835, pp. 51, 52, 55.

With his retirement in 1854, Pedder was compelled to give up many of the trappings of his official life, including his garden at *Newlands*. While hearing a criminal case on 19 July 1854, he was 'suddenly seized with an attack of paralysis, and had to be removed from the bench'.¹²⁵ Paralysed on the left side, Pedder found that his 'powers both of body and mind' were 'much decayed and still decaying', and resigned on 1 August.¹²⁶ Six months later, Sir John quitted his last official residence and moved his household to temporary accommodation in Hobart Town. Advertising his new address in the *Courier*, Pedder requested that 'henceforth all letters, papers, and parcels intended for him or any of his family may be directed to No. 80 Macquarie-street'.¹²⁷ This 'house and garden' at the 'corner of Antill and Macquarie Streets' belonged to a town allotment granted to Captain William Pedder in the 1830s, and was sold at auction for £1,500 immediately before Pedder's return to England in 1856.¹²⁸

Despite receiving a pension equal to his judicial salary of £1,500 per annum,¹²⁹ Sir John Pedder lived modestly in retirement. His colonial interests and many of his personal possessions were sold before his departure from Van Diemen's Land, and he did not buy property on his return to England.¹³⁰ Instead, Sir John made his final home in a furnished apartment in the fashionable Regency lodging house of Francis and Jane Hoare at 8, Bedford Square, in Brighton.¹³¹ Pedder's

¹²⁵ *Hobarton Mercury*, 22 July 1854, p. 2.

¹²⁶ Pedder to Denison, 1 August 1854, AOT G033/1/81, ff. 17-19, reel Z513; Bennett, *Sir John Pedder*, p. 111.

¹²⁷ *Courier*, 7 March 1855, p. 3.

¹²⁸ *Courier*, 22 January 1856, p. 2; AOT NS363/1/2. The house had previously been let to William Sorell. The site is now occupied by a petrol station.

¹²⁹ 17 Vic. No. 24, *Retiring Pensions for Judges of the Supreme Court Act* (1854); Bennett, *Sir John Pedder*, p. 111.

¹³⁰ No real estate or leaseholds were bequeathed in Pedder's will. Instead, he left shares or directed moneys to be invested in annuities. Will of Sir John Lewes Pedder, of 8, Bedford Square, Brighton, Sussex, dated 3 March 1859, proved 13 April 1859, Her Majesty's Courts Service.

¹³¹ Most of the houses in Bedford Square were lodging-houses 'from their very earliest days'. A. Dale, *Fashionable Brighton, 1820-1860* (Newcastle-upon-Tyne, Oriel Press Limited, 1967), p. 40. Pedder's final address is confirmed by his will and death certificate. Will of Sir John Lewes Pedder; Certified copy of an entry of death, John Lewes Pedder, 24 March 1859, General Register

estate was substantial, with 'Effects under £25,000', but he seems to have espoused religiously inspired criticism of 'ostentatious mourning'.¹³² At a time when members of the gentry and aristocracy often spent between £200 and £1,500 on a lavish funerary procession that would reflect their status in life,¹³³ Pedder directed his executors to ensure that his funeral would be 'simple and unostentatious and that the expense thereof may not on any account exceed One hundred pounds'.¹³⁴ Suggesting a religious objection to the mid-century shift away from churchyard to secular extra-mural burials,¹³⁵ Pedder also expressed the particular 'desire' to be 'buried in the Churchyard or other Parish Burial (not a cemetery) which shall be nearest to my residence at the time of my decease'.¹³⁶

Pedder's frugality did not extend to the living. He directed that his solicitor, William Carmalt Scott, should receive 'the sum of One hundred pounds (free of duty) for his trouble in the execution of the trusts of this my Will', while his live-in servant, Jane Wood, was bequeathed 'an annuity of One hundred pounds per annum' plus 'the sum of fifty pounds for mourning'.¹³⁷ By a codicil, Pedder also wished 'my very kind Landlord and Landlady Mr & Mrs Hoare to receive ten pounds as a slight acknowledgement of the trouble which they have taken

Office March Quarter 1859, Brighton, vol. 2b, p. 179, no. 116.

¹³² Will of Sir John Lewes Pedder; J.S. Curl, *The Victorian Celebration of Death* (Stroud, Sutton, 2000), p. 197.

¹³³ Curl, *The Victorian Celebration of Death*, p. 207.

¹³⁴ Will of Sir John Lewes Pedder.

¹³⁵ Influenced by fears about disease and an aesthetic shift towards landscaped cemeteries, a series of *Burial Acts* forced the closure of overcrowded churchyards in Britain during the 1850s. The new cemeteries were run by commercial or municipal organisations, rather than churches – a possible religious explanation for Pedder's preference for a churchyard burial. Curl, *The Victorian Celebration of Death*, pp. 137-138, 141-142.

¹³⁶ Will of Sir John Lewes Pedder. Communication with the Sussex Family History Group has failed to locate a tombstone for Pedder in the most likely Brighton burying grounds. As with St John's at New Town, burial sites were disturbed during the mid-twentieth century. Personal communication, Christine Payne, Sussex Family History Group, 19 November 2007.

¹³⁷ Will of Sir John Lewes Pedder. Mourning ephemera included black crape clothing, and accessories, such as mourning rings or brooches, often made with black enamel or jet. Curl, *The Victorian Celebration of Death*, pp. 199-202.

during my last illness of my behalf'.¹³⁸ Family members were also well provided for. Jane Pedder inherited her brother's shares in Phoenix and Pelican, and a loan of over £900 was remitted.¹³⁹ Niece, Jane Nunn, was to receive 'an Annual Income of four hundred pounds' from bank annuities, and her husband, Captain Loftus Nunn, was permitted to borrow up to £1,500 from the principal to purchase a commission as a major.¹⁴⁰ The remainder of Pedder's estate was to be invested to provide an income for his nephew, William Lewes.¹⁴¹

Highlighting the gendered dimensions of property ownership during the nineteenth century, Pedder's will differs noticeably from that of his sister. On her death in 1864, Jane Pedder owned company shares and two houses in Brighton; the vast bulk of her bequests, however, concern jewellery, paintings, decorative furniture, objets d'art, and other household items.¹⁴² Among the many pieces bequeathed to particular friends, relatives and servants is a single bequest to Jane Nunn of a 'black and gold enamel watch with the date of her father's birth and death in the inside of the case'.¹⁴³ By contrast, Sir John Pedder did not dispose of any personal items or objects of sentimental value in his will.

4.2 'Upright' and 'liberal': character and philanthropy

McKenzie's comparative colonial study demonstrates that reputation was a 'resource' to be managed and protected during the first half of the nineteenth century.¹⁴⁴ In the language of the time, 'character' – respectability and credit – was a central concern. In a study with significant focus on Van Diemen's Land,

¹³⁸ Second codicil to the Will of Sir John Lewes Pedder.

¹³⁹ Will of Sir John Lewes Pedder.

¹⁴⁰ First codicil to the Will of Sir John Lewes Pedder.

¹⁴¹ Will of Sir John Lewes Pedder.

¹⁴² Certified copy of an entry of death, Jane Pedder, 13 November 1864, GRO December Quarter 1864, St George Hanover Square, vol. 1a, p. 216, no. 106; Will of Jane Pedder, of 4, Western Cottages, Brighton, Sussex, dated 7 April 1863, proved 19 December 1864, Her Majesty's Courts Service.

¹⁴³ Will of Jane Pedder. William Lewes Pedder is not mentioned in his aunt's will.

¹⁴⁴ McKenzie, *Scandal in the Colonies*, p. 10.

Kirsty Reid explains that ‘securing character in the unknown and relatively anonymous world of the empire’ was problematic for aspirants to the colonial bourgeoisie.¹⁴⁵ Pedder’s position was different: as a high-profile official at the centre of the colonial administration for three decades, his personal and professional status was unusually stable. Pedder’s reputation for integrity and rectitude was also constant, and he was widely admired as ‘*sans tache et sans reproche*’, without spot, unrebukeable.¹⁴⁶ In many ways, then, Pedder represents a ‘benchmark’ of gentlemanly respectability in colonial society. Yet, he, too, remained actively concerned to manage his reputation.

Concern for ‘masculine honour’ underpinned the continuing popularity of duelling into the nineteenth century, but, under the influence of Evangelical reformers and changes to libel laws,¹⁴⁷ duelling was increasingly decried as a ‘savage practice’ and no longer (lawfully) employed to settle a point of honour between gentlemen in Van Diemen’s Land.¹⁴⁸ As McKenzie identifies, however, ‘elements of its ritual survived’ in the ‘bourgeois public sphere’ when middle- and upper-class men utilised the courts and the press to ‘attack and defend reputation’.¹⁴⁹ Two examples illustrate that Pedder also sought vindication in these fora when his character was impugned.

On 27 March 1827, the opposition *Australian* editorialised against judicial

¹⁴⁵ K.M. Reid, *Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Manchester, Manchester University Press, 2007), p. 74.

¹⁴⁶ *Courier*, 10 November 1843, p. 2. The allusion is biblical and chivalric. 1 Timothy 6:14 reads, ‘That thou keep this commandment without spot, unrebukeable, until the appearing of our Lord Jesus Christ’. The Chevalier de Bayard (c. 1473-1542), ‘*sans peur et sans reproche*’ (without fear and without spot), is also evoked.

¹⁴⁷ S. Petrow, ‘Duelling in Tasmania: The dismissal of Attorney-General, Thomas Welsh, in 1844’, *Tasmanian Historical Research Association Papers and Proceedings* 47 (3) (2000), p. 185.

¹⁴⁸ Duels and challenges to a duel were prosecuted in the Supreme Court as assault or a breach of the peace during Pedder’s judicial tenure. *Hobart Town Courier*, 16 May 1834, p. 3; R. v. Lewis [1834], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1834/r_v_lewis/> accessed 20 October 2011.

¹⁴⁹ McKenzie, *Scandal in the Colonies*, p. 64.

determinations in Van Diemen's Land which had the effect, respectively, of restricting trial by jury and introducing newspaper licensing. The Sydney newspaper vigorously championed a 'free press' and the extension of jury trial, and its partisan editor (and barrister) Robert Wardell railed that 'where [Pedder] clearly ought to have been with the people, he has been against them'.¹⁵⁰ By supporting legislative restrictions on civilian jury trial and the colonial press, Wardell declared, Pedder had 'stumbled over the Jury question, and ... fallen with – The Liberty of the Press'.¹⁵¹ Wardell's editorials were often characterised by 'an undertone of sarcasm ... arrogance and condescension',¹⁵² and his attack on Pedder was comparatively restrained. He did 'not to impute any wrong motives to Mr Pedder', but suggested that the judge's 'errors ... may be accounted for on the score of youth'.¹⁵³ Pedder responded with a civil action for libel in the Supreme Court of New South Wales.

At the same time, Wardell faced another libel action from Sydney magistrate, William Carter, for an editorial of 20 January 1827, in which the *Australian* condemned his handling of a case in the Court of Quarter Sessions.¹⁵⁴ In a long and vituperative satirical piece, Wardell emphasised Carter's lack of legal training, sarcastically remarking that Carter's 'want of skill ... is not supplied by experience'.¹⁵⁵ Legal adviser, James Norton, reported to the Governor of New South Wales that this 'very gross libel' represented a 'mischievous attack on [Carter's] conduct as a public Officer'.¹⁵⁶ It tended 'not only to bring him into contempt with the [other] Magistrates, but to hold his decision [in court] up to

¹⁵⁰ *Australian*, 27 March 1827, p. 3; Bennett, *Sir John Pedder*, p. 60; C.H. Currey, 'Wardell, Robert (1793-1834)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/wardell-robert-2773/text3941>> accessed 28 October 2011.

¹⁵¹ *Australian*, 27 March 1827, p. 3.

¹⁵² Currey, 'Wardell, Robert (1793-1834)', *Australian Dictionary of Biography*.

¹⁵³ *Australian*, 27 March 1827, p. 3.

¹⁵⁴ *Australian*, 20 January 1827, pp. 2-3.

¹⁵⁵ *Australian*, 20 January 1827, p. 3.

¹⁵⁶ James Norton to Governor Darling, 31 July 1827, *HRA* I, XIII, p. 483.

the ridicule of every person in the Colony'.¹⁵⁷ It was, in Norton's opinion, a 'proper subject for [criminal] prosecution'; Carter also had a 'clear right to commence a civil action' for libel.¹⁵⁸ However, when 'Informations were filed [by the attorney-general] on behalf of two private individuals; namely, Mr Carter and Mr Pedder' in June, Wardell successfully argued against the proceedings on the basis that the attorney-general had no legislative authority to prosecute *ex officio* for a private individual.¹⁵⁹ Neither case proceeded to trial, and the alleged libel against Pedder was never tested.

Bennett interprets Pedder's decision to prosecute as both an overly emotional response to criticism and an error of professional judgement. Pedder, he suggests, was 'hurt' and 'greatly angered' by the editorial; Wardell's criticism of his 'youth and inexperience' is supposed to have been particularly galling because the two men were 'exact contemporaries'.¹⁶⁰ Mirroring Wardell's critique, Bennett contends that Pedder would not have taken the 'foolish' and 'hasty' decision to prosecute, if he had possessed 'greater judicial perception' and the 'discerning judgement which becomes the judicial mien'.¹⁶¹ Through the prism of reputation, Pedder's response to this public attack on his character can be read very differently.

Chief Justice Pedder's comments from the bench during a libel trial in 1835 reveal his own conception of the value of reputation. Anti-government newspaper editor, Gilbert Robertson, was convicted of a series of criminal libels,

¹⁵⁷ Norton to Darling, 31 July 1827, *HRA* I, XIII, p. 483.

¹⁵⁸ Norton to Darling, 31 July 1827, *HRA* I, XIII, p. 483.

¹⁵⁹ *R. v. Wardell* (No. 1) [1827] NSWSupC 44, B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Division of Law Macquarie University), <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/r_v_wardell_no_1/> accessed 28 October 2011; Governor Darling to Under Secretary Hay, 1 August 1827, *HRA* I, XIII, pp. 477-479; William Carter to Colonial Secretary McLeay, 23 July 1827, *HRA* I, XIII, pp. 479-481; and Norton to Darling, 31 July 1827, *HRA* I, XIII, pp. 481-484.

¹⁶⁰ Bennett, *Sir John Pedder*, p. 60.

¹⁶¹ Bennett, *Sir John Pedder*, pp. 60-61.

including one on Governor Arthur, published in the *True Colonist*.¹⁶² During sentencing, Pedder explained that the libellous passages represented an 'endeavour to rob men of their characters'.¹⁶³ Emphasising the high value of this 'resource', Pedder declared that there were 'many persons who would as soon lose their property and their lives as their character, and some who would sooner'.¹⁶⁴ Pedder's tone suggests that he was among those 'who would sooner'. Moreover, Pedder observed, Robertson's libel on the governor – a senior public official and representative of the king – constituted an attack on a 'personage who every moral and religious feeling should have prevented you from libelling'.¹⁶⁵

Framed by this legal and socio-political context, Pedder's indignation and proposed litigation against Wardell read less as the over-reaction of a young and inexperienced professional than an example of one of the few legitimate 'ritual' responses available to a man in Pedder's position. As chief justice, he could not challenge Wardell to a duel¹⁶⁶ – which, in any case, he condemned from the bench as a 'diabolical mode of proceeding'.¹⁶⁷ Neither could he respond to Wardell in the press without compromising his judicial dignity. A libel action was the only honourable response to an attack on his character and his status as a representative of the king. In a contextualising parallel, Pedder's old friend, Saxe Bannister, fought a duel with Wardell in October 1826, when his attempt to

¹⁶² R. v. Robertson (No. 1) [1835], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/r_v_robertson_no_1_1835/> accessed 20 October 2011.

¹⁶³ R. v. Robertson (No. 1) [1835].

¹⁶⁴ R. v. Robertson (No. 1) [1835].

¹⁶⁵ R. v. Robertson (No. 1) [1835].

¹⁶⁶ cf. the Attorney-General of Van Diemen's Land was forced to resign in 1844, after fighting a series of duels with his predecessor. Petrow, 'Duelling in Tasmania', pp. 186-187.

¹⁶⁷ Pedder had also observed judicially that, 'No provocation ... could justify a challenge' to a duel. See *In re Sinclair* [1827], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1827/in_re_sinclair/> accessed 20 October 2011, and *R. v. Kermode and Hood* [1824], <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_kermode_and_hood/> accessed 20 October 2011.

prosecute the pressman for libelling him in the *Australian* was thwarted.¹⁶⁸

Print media connected Van Diemen's Land to the 'web of transmitted information' that linked colonists to the metropole and other British colonies.¹⁶⁹ By the mid-1830s, historical geographer Alan Lester points out, newspapers 'at every site of colonization [*sic*] were extracting extensively from each other as well as from the main metropolitan papers'.¹⁷⁰ Citing the example of Francis Short, a Sydney merchant who feared that 'an accusation of perjury' made against him in the *Sydney Gazette* 'might be read in England, at the Cape, and in India; in all of which places he ... was well known',¹⁷¹ McKenzie illustrates that aspersions cast in the press did indeed have 'empire-wide implications'.¹⁷²

An incident from 1852 reveals that Sir John Pedder experienced a similar concern to defend his character against false assertions published in the metropolitan and colonial press. As Pedder explained to the editor of the *Courier* in Hobart Town,

SIR, In the last number of the *Courier* you have copied, from the *Globe* of August 20th, an extract from a letter from an officer of the 99th Regiment, dated at Hobart Town Barracks, 13th March, 1852, in which appears the following paragraph, viz. 'Lady Pedder told me yesterday that Sir John offered his coachman £200 a year, and yet could not induce him to remain'.

I think it right to inform those of your readers to whom Lady Pedder and myself are unknown, that there is not one word of truth in the

¹⁶⁸ Bannister had just resigned as attorney-general, and Governor Darling refused to prosecute a libel on former official. C.H. Currey, 'Bannister, Saxe (1790-1877)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/bannister-saxe-1738/text1919>> accessed 1 August 2011.

¹⁶⁹ McKenzie, *Scandal in the Colonies*, p. 10.

¹⁷⁰ A. Lester, 'British settler discourse and the circuits of empire', *History Workshop Journal* 54 (1) (2002), p. 32.

¹⁷¹ Short v Howe [1826] NSWSupC 7, *Decisions of the Superior Courts of New South Wales, 1788-1899*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1826/short_v_howe/> accessed 27 October 2011; McKenzie, *Scandal in the Colonies*, p. 10.

¹⁷² McKenzie, *Scandal in the Colonies*, p. 10.

whole of the paragraph. Lady Pedder never told any officer of the 99th Regiment, nor anyone else, that I had made such an offer to a coachman ; and, in fact, I had not made such an offer, nor any other offer, to induce a coachman to remain with me.¹⁷³

This brief letter is illuminating for several reasons. The *Globe and Traveller* was the major London evening newspaper, and the 'official organ of the Whigs'.¹⁷⁴ Any comment on Pedder's character would have been read by a large audience, including his superiors in the imperial administration, and colonial subscribers to the *Globe*. With its republication in the *Courier*, the extract was read by a still wider audience, and it is to this largely 'unknown' audience that Pedder addresses his repudiation. With a lawyer's precision, he explains that Lady Pedder had not made the statement attributed to her; neither had he made any offer to his coachman. He appears confident that readers who knew him and Lady Pedder, either personally or by repute, would recognise the falsehood of the letter's claims.

Suggesting that the *Globe* had a sizeable audience in Van Diemen's Land, the aspersive letter provoked a further exchange in the colonial press. On 4 December, a correspondent signing himself 'Nullus' ('Nobody') informed the editor of the *Courier*, 'for the benefit of readers of the *Globe*', that the 'monstrous extract of a letter of one of the officers of the 99th regiment' was a 'tissue of falsehoods'.¹⁷⁵ In turn, this letter provoked a vindictory letter from Pedder's nephew-in-law, Loftus J. Nunn – an ensign in the 99th Regiment. Nunn and 'several of [his] friends' considered that Nullus's letter was 'evidently levelled at' him, and he vigorously defended himself against the 'malicious' attempt to 'slander [him] upon mere suspicion' of having written to the *Globe*.¹⁷⁶ Though

¹⁷³ *Courier*, 1 December 1852, p. 3. Original capitalisation.

¹⁷⁴ S. Rosenberg, 'Some further notes on the history of the "Globe": Its editors, managers, and proprietors', *Victorian Periodicals Newsletter*, No. 15, [Vol. 5, No. 1] (1972), p. 43, <<http://www.jstor.org/pss/20084930>> accessed 27 October 2011.

¹⁷⁵ *Courier*, 4 December 1852, p. 3.

¹⁷⁶ *Courier*, 11 December 1852, p. 3.

ephemeral in themselves, the original letter and the series of repudiations it provoked provide a concrete example of the centrality of reputation to Pedder's self-conception and his standing in the community. They also underscore its value as a lens through which to read the concerns of the 'intimately connected communities' of the early nineteenth-century empire.¹⁷⁷

Pedder's high standing in settler society created both opportunities and obligations, and throughout his colonial residence the chief justice devoted his energy and attention to a range of philanthropic and cultural endeavours. His arrival in Van Diemen's Land in the mid-1820s coincided with the promotion of 'liberal' ideas around adult education, as well as the emergence of an early colonial 'scientific tradition', embodied in the various precursors of the Royal Society of Van Diemen's Land/Tasmania, in which Pedder was actively involved.¹⁷⁸ Pedder was a founding fellow of the Botanical and Horticultural Society of Van Diemen's Land, which became the Royal Society of Van Diemen's Land for Horticulture, Botany and the Advancement of Science in 1844 (the Royal Society). He also served as vice-patron of the Natural History Society of Van Diemen's Land (better known as the Tasmanian Society),¹⁷⁹ and the short-lived Van Diemen's Land Scientific Society, founded by Dr John Henderson on the model of 'literary and scientific societies in India and Europe' in 1829.¹⁸⁰

With few trained scientists and no local university, the Royal Society functioned in many ways as an 'agreeable "club"' for interested amateurs drawn from

¹⁷⁷ McKenzie, *Scandal in the Colonies*, p. 10.

¹⁷⁸ M. Roe, 'Episodes of thought' in Alexander, *Companion to Tasmanian history*, <http://www.utas.edu.au/library/companion_to_tasmanian_history/E/Episodes%20of%20Thought.htm> accessed 10 October 2011; Winter, 'The foundation years of the Royal Society of Tasmania', p. 62.

¹⁷⁹ *Sydney Gazette*, 18 November 1837, p. 2; M.E. Hoare, 'Adolf Basser Library: Notes on research. Some primary sources for the history of scientific societies in Australia in the nineteenth century', *Records of Australian Academy of Science* 1 (4) (1966), p. 74.

¹⁸⁰ M.E. Hoare, 'Doctor John Henderson and the Van Diemen's Land Scientific Society', *Records of Australian Academy of Science* 1 (3) (1966), p. 14; *Hobart Town Courier*, 12 December 1829, p. 2.

among the colony's 'high-ranking civil servants, wealthy graziers, [and] clergymen'.¹⁸¹ Focussing on this social dimension, Bennett asserts that Pedder 'contributed to [the] prestige' of this 'exclusive' group, but 'participated only sparingly in the Society's important activities'.¹⁸² While the society was certainly socially exclusive, Gillian Winter makes the more important contextual point that, unlike many scientific societies in Europe, the Royal Society did not exclude non-scientists.¹⁸³ Pedder's concurrent membership of the rival Tasmanian Society suggests that he was actively interested in contemporary scientific pursuits. As Michael Hoare points out, 'Status and position were not automatic passports for membership to the Tasmanian Society; only men with a genuine scientific interest were invited to join'.¹⁸⁴

Non-elite self-improvement organisations were another adult education venture to which Pedder donated his time as an officer bearer. Elucidating the underlying cultural currents, Michael Roe explains that supporters of these organisations believed that 'common people could achieve a well-ordered, moral, and comfortable life' through education and self-improvement.¹⁸⁵ Pedder shared their paternalistic concerns. Following the British model, the Van Diemen's Land Mechanics' Institute was founded in 1827, with Pedder as its president.¹⁸⁶ As Petrow explains, mechanics' institutes provided valuable educational opportunities for non-professional men.¹⁸⁷ They also aimed to 'inculcate an acceptance of the political status quo and thus make more radical

¹⁸¹ Winter, 'The foundation years of the Royal Society of Tasmania', p. 61.

¹⁸² Bennett, *Sir John Pedder*, p. 135, n. 61.

¹⁸³ Winter, 'The foundation years of the Royal Society of Tasmania', p. 61.

¹⁸⁴ M.E. Hoare, "'All things are queer and opposite": Scientific societies in Tasmania in the 1840s', *Isis* 60 (2) (1969), p. 202. The Tasmanian Society amalgamated with the Royal Society in 1848.

¹⁸⁵ Roe, 'Episodes of thought' in Alexander, *Companion to Tasmanian history*.

¹⁸⁶ R.W. Giblin, *Early History of Tasmania. Volume II* (Melbourne, Melbourne University Press/Oxford University Press, 1939), p. 528; S. Petrow, 'The life and death of the Hobart Town Mechanics' Institute, 1827-1871', *Tasmanian Historical Research Association Papers and Proceedings* 40 (1) (1993), pp. 7-18.

¹⁸⁷ As Petrow points out, the meaning of 'mechanic' was nebulous, but generally covered manual workers. S. Petrow, *Going to the Mechanics: A History of the Launceston Mechanics' Institute, 1842-1914* (Launceston, Historical Survey of Northern Tasmania, 1998), p. 4.

doctrines less attractive'.¹⁸⁸ Despite 'President Pedder's close relations with Arthur', this early incarnation of the Mechanic's Institute foundered: the colonial government provided no financial support, and the perception of 'an exclusive and narrow spirit in the management' eroded public support.¹⁸⁹

The Tasmanian Public Library was another self-improvement institution dominated by gentlemen. The Library was established under vice-regal patronage in May 1849, and Pedder was elected president 'by a majority of votes' at the inaugural meeting.¹⁹⁰ This subscription and circulating library was open to members for an annual subscription of £2 – a sum advertised as being 'lower than that collected by our Sydney neighbours'.¹⁹¹ The library opened to subscribers in August 1849 and aimed to contain 'works of reference for all classes'.¹⁹² Within two years, there were '3500 volumes on the shelves'.¹⁹³

Pedder's involvement with the library not only reveals his concern for self-improvement through education, but also provides insights into his own literary and cultural interests.¹⁹⁴ Comments from fellow members at the time of his retirement as president highlight Pedder's contemporary reputation for scholarly pursuits beyond the law. Pedder's letter of resignation was read at the annual general meeting for 1855. He was, he informed the secretary, 'still a sufferer from the effects of a paralytic stroke, with which I was afflicted nearly twelve months ago'.¹⁹⁵ Evidently reluctant to abandon his commitment to the

¹⁸⁸ Petrow, 'The life and death of the Hobart Town Mechanics' Institute', p. 7.

¹⁸⁹ Petrow, 'The life and death of the Hobart Town Mechanics' Institute', p. 9.

¹⁹⁰ *Courier*, 30 June 1849, p. 3; *Cornwall Chronicle*, 4 July 1849, p. 693.

¹⁹¹ *Launceston Examiner*, 26 May 1849, p. 6; *Courier*, 20 June 1849, p. 3.

¹⁹² *Courier*, 20 June 1849, p. 3.

¹⁹³ *Courier*, 17 May 1851, p. 2.

¹⁹⁴ An item (presumably in Pedder's private library) reveals his taste for religious and sentimental poetry. With his sister, Jane, his name appears among the list of subscribers to Miss Rebecca Lee's 'little book'. R. Lee, *Verses, Original, and Translated from the Italian and French* (London, Hamilton, Adams and Co., 1842), p. xx.

¹⁹⁵ Pedder to [the secretary] A. Gardiner, 12 July 1855, published in *Colonial Times*, 13 July 1855, p. 2. An abridged report of the meeting also appears in the *Courier*, 13 July 1855, p. 2.

library, Pedder nonetheless felt it was ‘my duty to resign ... from the office which I have the honor of holding of president of the Tasmanian Public Library’.¹⁹⁶ Proposing a resolution ‘expressive of our regret’ at the ‘loss’ of the president, family friend, Joseph Hone, observed that he had never known ‘a more amiable and excellent man, and one more calculated to advance truth, science, literature, and all that conduces to the well-being of society’.¹⁹⁷ From the chair, Bishop Nixon praised Pedder as an ‘accomplished scholar’.¹⁹⁸ This was no mere flattery from his provincial friends: their opinion echoes the earlier assessment of the internationally celebrated explorer, Jules Dumont d’Urville, who admired Pedder as one of the ‘best educated Englishmen’ he had ever met.¹⁹⁹

Charitable subscriptions illuminate another aspect of Pedder’s community engagement, and identify some of the causes he considered ‘worthy’, the quantum of his donations, and the exemplary role of ‘respectable’ members of colonial society in an era of limited state intervention in welfare initiatives. The colonial press regularly published appeals to support philanthropic institutions and causes. Donors rarely remained anonymous, and lists of subscribers’ names, with their contributions, were printed in descending order of precedence and liberality. As the two most senior colonial officials, the lieutenant-governor and the chief justice routinely donated considerably larger sums than other public officials or private individuals; Pedder usually donated a slightly smaller amount than his superior.

Ad hoc charitable donations were often made to victims of accident and

¹⁹⁶ Pedder to Gardiner, 12 July 1855, *Colonial Times*, 13 July 1855, p. 2.

¹⁹⁷ *Colonial Times*, 13 July 1855, p. 3.

¹⁹⁸ *Colonial Times*, 13 July 1855, p. 3.

¹⁹⁹ H. Rosenman (ed. and trans.), Jules Sébastien-César Dumont d’Urville, *An Account in Two Volumes of Two Voyages to the South Seas by Captain (later Rear-Admiral) Jules S-C Dumont D’Urville of the French Navy to Australia, New Zealand, Oceania, 1826-1829, in the Corvette Astrolabe and to the Straits of Magellan, Chile, Oceania, South East Asia, Australia, Antarctica, New Zealand and Torres Strait, 1837-1840, in the Corvettes Astrolabe and Zélée*, Vol. 1 (Melbourne, Melbourne University Press, 1987), p. 175.

misfortune (or their dependents). In 1833, for example, colonists in Van Diemen's Land raised over £500 for the relief of survivors of the 'melancholy shipwreck' of the *Hibernia*, which was destroyed by fire near the equator on its voyage from Liverpool to Hobart Town.²⁰⁰ The maritime disaster elicited particular sympathy in the southern colonies: many of the victims were emigrants for Van Diemen's Land, and survivors later travelled on to the colony after recuperating in Rio de Janeiro.²⁰¹ Governor Arthur donated £20 to the relief fund, while Chief Justice Pedder pledged 10 guineas.²⁰² By comparison, junior officers and civil officials, such as Captain William Pedder and Principal Postmaster, J.T. Collicott, each subscribed three guineas.²⁰³ Individual misfortune was also relieved by subscription. In 1843, Pedder was among the 'benevolent' contributors to a fund for the 'succour of the widow and children of the late Mr W.H. Wilmot (late Master of Longford Hall Academy)', whose suicide had left his family 'wholly unprovided for'; he donated £5.²⁰⁴

Pedder also subscribed to more systematic initiatives to improve the well-being of the community. Outside the government-funded convict medical service, private philanthropy was vital for establishing healthcare services for the free settler population.²⁰⁵ With an initial donation of £5 in 1841, and one guinea for the following year's subscription,²⁰⁶ Sir John supported St Mary's Hospital and Self-Supporting Dispensary, which aimed to provide treatment for 'private patients and the industrious poor' in Hobart Town.²⁰⁷ Three years later, Sir John

²⁰⁰ *Sydney Gazette*, 27 June 1833, p. 2; *Hobart Town Courier*, 17 May 1833, p. 3.

²⁰¹ For two accounts of the disaster, reprinted from the Hobart Town press, see *Sydney Gazette*, 27 June 1833, p. 2.

²⁰² *Colonist*, 11 June 1833, p. 3.

²⁰³ *Colonist*, 11 June 1833, p. 3.

²⁰⁴ *Courier*, 27 January 1843, p. 3.

²⁰⁵ W. Rimon, 'Hospitals' in Alexander, *Companion to Tasmanian History*, <http://www.utas.edu.au/library/companion_to_tasmanian_history/H/Hospitals.htm> accessed 1 October 2011.

²⁰⁶ *Courier*, 28 May 1841, p. 1. A guinea (21 shillings) is the 'ordinary unit for a professional fee and for a subscription to a society or institution'. *OED*.

²⁰⁷ Rimon, 'Hospitals' in Alexander, *Companion to Tasmanian History*.

and Lady Pedder continued their support, each subscribing one guinea to the hospital's building fund.²⁰⁸ In 1843, Pedder offered his support to a second private hospital, this time in the northern town of Launceston. With the Lord Bishop of Tasmania, Francis Nixon, Pedder served as joint vice-patron of St John's Hospital and Self-Supporting Dispensary.²⁰⁹

Evidence from the colonial archive illustrates that Pedder also demonstrated practical concern for animal welfare, endeavouring to prevent or punish animal cruelty. In 1829, he formally expressed his concern to Governor Arthur that a Ticket-of-Leave man named Parker should be prevented from 'running' his horse 'too hard' on the road from Hobart Town to Launceston.²¹⁰ In March 1838, 'William Wilcox, an assigned servant, was charged by Judge Pedder, with cruelty to a dog that draws a truck, of which the prisoner had charge'.²¹¹ Having discovered 'in whose service' the defendant was employed, Pedder 'had him confined, and preferred this charge against him'.²¹² Wilcox was convicted and, although the presiding magistrate 'felt it imperative to make an example' of him, his previous good character resulted in a reduced sentence of 'ten days on the treadmill'.²¹³

Pedder also sought to help animals and their owners in other ways. In August 1843, he willingly pastured the 'ship's cow' of new arrivals, Bishop and Mrs Nixon.²¹⁴ After the travails of the long sea voyage, Anna Maria Nixon reported that 'poor Duchess' was now 'at Sir John Pedder's daily recovering her

²⁰⁸ *Courier*, 28 June 1844, p. 1.

²⁰⁹ *Cornwall Chronicle*, 2 August 1845, p. 43.

²¹⁰ Pedder to Arthur, 31 December 1829, Arthur Papers, vol. 9, ML ZA 2169.

²¹¹ *Hobart Town Courier*, 16 March 1838, p. 4.

²¹² *Hobart Town Courier*, 16 March 1838, p. 4.

²¹³ *Hobart Town Courier*, 16 March 1838, p. 4.

²¹⁴ Anna Maria Nixon to Echo, 17 August 1843, in N. Nixon (ed.), *The Pioneer Bishop of Van Diemen's Land, 1848-1863: Letters and Memories of Francis Russell Nixon, D.D., First Bishop of Tasmania* (Hobart, J. Walch & Sons, 1953), p. 10.

looks' and 'growing fat in [his] meadows' at *Newlands*.²¹⁵ Two years later, Pedder placed a long advertisement in the *Courier*, attempting to reunite a 'small DOG of a yellow or dun colour' with his owner.²¹⁶ The dog had 'followed a Carriage' in the Southern Midlands, before being 'taken up on the coach-box and carried to Hobart Town [...] Whoever has lost it may have it returned on application to Sir John Pedder's Coachman, at Newlands, or to Mr Thomas Gardiner, Crier of the Supreme Court, Davey-street, Hobart Town'.²¹⁷

Pedder's commitment to the Church of England was combined with his interest in education in his support for Christ College and its feeder school, Hutchins. When the boys' school was established in Hobart Town in memory of Archdeacon William Hutchins, Pedder supported requests for a land grant and £400 funding from the colonial government, served as chairman of the Committee for the Hutchins Memorial, and personally subscribed £20 to the school.²¹⁸ After abortive government attempts during the early 1840s to found a non-denominational institution to prepare young men for university, Christ College was finally opened at Bishopsbourne, in the north of the island, under the auspices of Bishop Nixon and the Church of England.²¹⁹ His friends, Bishop Nixon and John Helder Wedge were intimately involved with the college, and his nephew was a pupil.²²⁰ Pedder's contribution to the College was honoured with

²¹⁵ Anna Maria Nixon to Echo, 17 August 1843, and 23 August 1843, in Nixon, *The Pioneer Bishop*, pp. 10-11. The Nixons sailed to Van Diemen's Land aboard the *Duke of Roxburgh*, hence the cow's name.

²¹⁶ *Courier*, 1 November 1845, p. 1. Original capitalisation.

²¹⁷ *Courier*, 1 November 1845, p. 1.

²¹⁸ G. Stephens, *The Hutchins School: Macquarie Street Years, 1846-1965* (Hobart, The Hutchins School, 1979), pp. 6, 31; *Courier*, 11 June 1841, p. 3; Committee of Subscribers to Archdeacon Hutchins' School, Correspondence: Letter and attachment of subscribers from J.L Pedder, Chairman of the Committee, to John Leake, 11 June 1841, AOT NS1053/1/1.

²¹⁹ O. Heywood, "'A stronghold of learning and a school of Christian gentlemen': Christ College, Tasmania – from its beginning until its first closure in 1856", *Tasmanian Historical Research Association Papers and Proceedings* 20 (42) (1973), pp. 42-57; W.H. Hudspeth's Historical Files. Subject file: Christ College Centenary, AOT NS690/1/99. Pedder's name was among those engraved on the foundation stone laid at the original Christ College site at New Norfolk. Franklin, *Narrative of Some Passages in the History of Van Diemen's Land*, Appendix E, p. 152.

²²⁰ Nixon was the driving force behind the opening of the College at Bishopsbourne, and

the 'Pedder Scholarship', which continued to be awarded into the twentieth century by the Hutchins School, following the absorption of Christ College by the University of Tasmania.²²¹ As a voluntary member of the management committee at the Queen's Orphan School in New Town, Pedder also demonstrated his concern for child welfare within a state-sponsored institutional context. His active involvement is revealed in a letter of 1836, in which he reports having been 'all Thursday Friday Saturday & yesterday employed about the Orphan School business'.²²² 'As usual', Pedder remarked, 'it is left to me to write the letters'.²²³

Pedder also wrote personal letters in support of individuals who sought his assistance. In July 1834, Pedder was visited by 'a miserable looking tattered man', who had 'come all the way' from east coast of the island to give him a letter.²²⁴ In it, the man referred to a 'communication' that Pedder had made to him at the Supreme Court sittings in Launceston in 1825, when the 'tattered man' had prosecuted a man called Mason for 'cutting his throat and wounding him in the arm'.²²⁵ Pedder had 'no recollection of the man's person, nor of the communication', but 'promised to make some enquiry into his statements'.²²⁶ Illustrating his diligence and concern, even in the case of a stranger to whom he owed no particular obligation, Pedder consulted his old trial notes. While he found that the man's statements were 'not correct', he evidently took his promise to the man seriously, thought carefully about his claims, and made time

appointed Wedge as estate manager, 1846-1851. On William Lewes Pedder as a pupil, see section 2.3.

²²¹ Heywood, "A stronghold of learning and a school of Christian gentlemen", pp. 51, 55; *Hutchins School Magazine* (Midwinter, 1924), pp. 4, 32, <<http://apollo.hutchins.tas.edu.au/community/digital-heritage/The%20Hutchins%20School%20Magazine%2018942008/1924%20Midwinter.pdf>> accessed 30 October 2011.

²²² Pedder to Arthur, 5 July 1836, Arthur Papers, vol. 10, ML ZA 2170.

²²³ Pedder to Arthur, 5 July 1836, Arthur Papers, vol. 10, ML ZA 2170.

²²⁴ Pedder to Arthur, 14 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²²⁵ Pedder to Arthur, 14 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²²⁶ Pedder to Arthur, 14 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

to write at length on the matter to Arthur.²²⁷

A supplication from Mr Woolrabe was more successful. In August 1836, Pedder made a personal appeal to Governor Arthur on behalf of Woolrabe, a settler who sought assistance for his children. Woolrabe's circumstances were 'very poor', Pedder recited: he had 'done his best ... to give his children good educations', but his 'health is very precarious, and his mind is continually possessed by the idea that he shall die before he can see his children settled and without any thing to leave them'.²²⁸ Pedder's compassion for this 'worthy' family urged him to action. As he explained to Arthur, Woolrabe 'is indeed much to be pitied or I would not think of thus intruding upon Your Excellency when I know every amount of your time to be so fully occupied'.²²⁹ At the beginning of September, Pedder acknowledged Arthur's 'kind answer to my note respecting Young Woolrabe'; in January 1837, he was writing again to thank Arthur for helping the family by appointing Woolrabe's son to a government post.²³⁰

Pedder's final letter on the subject reveals not only his satisfaction at the result of this act of minor patronage, but also the amorphous public/private spaces in which these communications occurred. Almost a week after learning of Arthur's intervention, Pedder wrote, 'I fear you have thought me very ungrateful for not having before returned you my best thanks, which I now beg to do, for the appointment Your Excellency has been pleased to give to young Mr Woolrabe'.²³¹ 'The truth is', he confessed,

I received Your Excellency's note on Saturday evening when I was with a party at tables [playing backgammon] and, having just glanced my eye over it and ascertained that it did not require an immediate

²²⁷ Pedder to Arthur, 14 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²²⁸ Pedder to Arthur, 16 August 1836, Arthur Papers, vol. 10, ML ZA 2170.

²²⁹ Pedder to Arthur, 16 August 1836, Arthur Papers, vol. 10, ML ZA 2170.

²³⁰ Pedder to Arthur, 2 September 1836, and 27 January 183[7], Arthur Papers, vol. 10, ML ZA 2170.

²³¹ Pedder to Arthur, 27 January 183[7], Arthur Papers, vol. 10, ML ZA 2170.

answer, I put it into my coat pocket, and unfortunately forgot it, until when dressing yesterday evening, and being about to put on the same coat, I found it in the pocket. By the same accident I lost the pleasure of first answering Your Excellency's kindness to young Woolrabe's sister who with the rest of the family is very thankful for it.²³²

Pedder's concern for 'family values' and their central role in demonstrating respectability is also reflected in testimonials in support of two transportees: one his neighbour, the other his assigned servant. On his retirement in 1843, emancipist Inspector of Stock, James Belbin, applied for a government pension, using references from senior officials.²³³ Sir John Pedder was the first to write in support. He had known Belbin for 'nearly twenty years', during fourteen of which the former convict had 'resided exactly opposite to me in Macquarie Street'.²³⁴ 'During that time', Pedder continued,

he and his family were, I may almost say, under my daily supervision. I can bear witness to the assiduity with which he performed the duties of his office [...] and also to the exemplary manner in which with slender means he has brought up a numerous family. Mr Belbin and his wife are individually and highly respected and by none more so than Lady Pedder and myself.²³⁵

Pedder's repeated support for a free pardon for his assigned servant, William Rice, similarly indicates a belief in convicts' capacity for reform. It also provides further evidence to refute conventional representations in which Pedder was 'always predisposed ... to bear hard on the defects of ... opponents of ... government, on the poor, and on the convict population'.²³⁶ Rice was one of the

²³² Pedder to Arthur, 27 January 183[7], Arthur Papers, vol. 10, ML ZA 2170.

²³³ Testimonial of J.L. Pedder, 16 December 1843, in J. Belbin, *Convict James Belbin's References, Van Diemen's Land 1843 and 1844*, University of Tasmania Library Special and Rare Materials Collection, Australia (Unpublished), f. 2, <<http://eprints.utas.edu.au/6470/>> accessed 30 October 2008; F.C. Green, 'Belbin, James (1771-1848)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010075b.htm>> accessed 9 October 2009. Belbin was granted a pension of £75.

²³⁴ Testimonial of J.L. Pedder, 16 December 1843.

²³⁵ Testimonial of J.L. Pedder, 16 December 1843.

²³⁶ K. Fitzpatrick, *Sir John Franklin in Tasmania, 1837-1843* (Melbourne, Melbourne University Press, 1949), p. 106.

'Yorkshire Rebels', a group of young men transported for their involvement in economically driven disturbances in the aftermath of the Peterloo Massacre of 1819.²³⁷ Transported in 1820, he was assigned to Pedder as a constable in 1824. As a result of this personal relationship, his petition for a free pardon 'excited [Pedder's] strong commiseration'.²³⁸

Forwarding the document to the Colonial Office in 1828, Governor Arthur explained that it caused him 'some embarrassment' to submit the 'claims of Persons transported for High Treason', but he had 'promised the chief justice' that he would tender Rice's petition.²³⁹ In his supporting testimonial, Pedder confirmed that he had known Rice since his 'arrival in this Colony in March 1824'.²⁴⁰ Pedder had also

made enquiries into his conduct and character and I have great pleasure in stating my sincere belief that by his good morals his industry and the exemplary way in which he has brought up his family, he is highly deserving of the favour he requests.²⁴¹

Unsuccessful in 1828, Pedder supported a renewed effort to gain a pardon in 1835. Pedder's second testimonial specifies the qualities he admired in a 'respectable' emancipist. By now, the chief justice had known Rice

upward of eleven years and during nine of them (when he was my constable) I was in the habit of seeing him almost daily. I can say that he is one of the most respectable men of his class in life that I have ever met with either here or elsewhere, honest, sober, industrious, a good husband and a good father. He is much respected in my family and generally by all who know him. I should have the greatest pleasure in hearing that he has obtained the free pardon he prays for.²⁴²

²³⁷ On their uprising and lenient treatment by the courts, see *HRA* III, VII, pp. 780-781, Note 289.

²³⁸ Arthur to Huskisson, 9 June 1828, *HRA* III, VII, p. 338.

²³⁹ Arthur to Huskisson, 9 June 1828, *HRA* III, VII, p. 338.

²⁴⁰ Testimonial of J.L. Pedder, 7 June 1828, *HRA* III, VII, p. 341.

²⁴¹ Testimonial of J.L. Pedder, 7 June 1828, *HRA* III, VII, p. 341.

²⁴² Pedder's certificate to Rice's petition, 8 June 1835, cited in C. Cartwright and B. Mortimer, 'Doomed to exile: A Yorkshire Rebel's struggle to obtain his freedom', *Tasmanian Historical Research Association Papers and Proceedings* 51 (18) (2011), p. 45.

As with Belbin, Pedder was in almost daily contact with Rice for over a decade, and had countless opportunities to observe his public and private character. Diligence in their work and commitment to their families was clearly the basis of Pedder's respect for the two men, and his ability to disregard their original offences – including high treason – gives the lie to Kathleen Fitzpatrick's 1949 assertion that Pedder 'sincerely believed that an opponent of authority could not also be a respectable citizen'.²⁴³

A final example of Pedder's charitable impulses concerns his compassion towards a convict servant who repeatedly demonstrated that he did not live up to respectable ideals of industry and sobriety. Robert Browett was transported for life for burglary, and arrived in Hobart Town in 1825.²⁴⁴ His conduct record indicates that he was employed as a 'Constable at the Judges [*sic*]' by 1829.²⁴⁵ As a 'petty constable' in Governor Arthur's new police system, Browett received a salary of £10 per annum, as well as additional food and clothing.²⁴⁶ In the opinion of Pedder's close friend, Chief Police Magistrate, Matthew Forster, 'Browett had a good place, for ... he was ... in possession of nearly equal advantages as if he had been free'.²⁴⁷

In 1829, Browett appeared before Chief Justice Pedder in the Supreme Court, charged with 'stealing a watch, value 2l'.²⁴⁸ Convicted and sentenced to seven years' secondary transportation, on review his punishment was reduced to two

²⁴³ Fitzpatrick, *Sir John Franklin in Tasmania*, p. 106.

²⁴⁴ Convict indent, Robert Browett, AOT CON14/1/1, p. 7, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON14-1-1,46,14,S,80> accessed 12 September 2008.

²⁴⁵ Conduct record, Robert Browett, AOT CON31/1/1, p. 202, no. 807, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-1,433,300,L,80> accessed 12 September 2008.

²⁴⁶ *Hobart Town Gazette*, 1 November 1828, p. 2. Constables were also entitled rations and two suits of slop clothing. S. Petrow, 'Policing in a penal colony: Governor Arthur's police system in Van Diemen's Land, 1826-1836', *Law and History Review* 18 (2) (2000), pp. 363, 365-366, 373.

²⁴⁷ Chief Police Magistrate to the Colonial Secretary, 6 December 1834, AOT POL318/1/3, f. 97.

²⁴⁸ *Hobart Town Courier*, 4 April 1829, p. 2, and 18 April 1829, p. 1.

years in a chain gain.²⁴⁹ Browett had returned to Pedder's service by 1831,²⁵⁰ and in November 1834, he appeared before a magistrate, charged with being 'drunk and out after hours'.²⁵¹ His punishment was 'to be placed in a Cell, and fed upon bread and water only, for four days and four nights'.²⁵² Pedder twice informed the authorities that he 'did not wish to have Browett back again',²⁵³ and, at a time when 'so many well conducted prisoners cannot be assigned', Chief Police Magistrate Forster concluded that there 'would be but little justice in allowing a man like Browett to remain in assigned Service – he having proved himself totally unworthy of such levity'.²⁵⁴ On Forster's recommendation, Governor Arthur ordered him to twelve months' hard labour on the road party at Grass Tree Hill on top of the magistrate's sentence.²⁵⁵

Attempting to prevent his former servant being sent to a road party, Pedder's letters on the subject of Browett's punishment are among his longest extant correspondence in the Arthur Papers.²⁵⁶ While most letters in the collection comprise two or three pages, Pedder's second letter concerning Browett extends to seven sheets. Illustrating its priority, the chief justice devoted only three pages to an official letter written on the same day about the potential prosecution of 'an audacious libel' on a government official.²⁵⁷ Pedder evidently felt paternalistic concern for Browett, and was troubled by his potential fate. He

²⁴⁹ AOT MM71/1/7 Tasmanian Archival Estrays in Dixon Library Governor's Office and Judges Reports, 1823-1839, ff. 502-503, reel Z3234.

²⁵⁰ In 1834, Pedder confirmed that Browett had been living in his Macquarie Street household 'upwards of three years'. *Colonial Times*, 30 October 1829, p. 4; Appendix 5: Criminal Trials, 1829, *HRA* III, IX, p. 999; Conduct record, Robert Browett; Pedder to Arthur, 6 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁵¹ Conduct record, Robert Browett.

²⁵² Conduct record, Robert Browett; Chief Police Magistrate to the Colonial Secretary, 6 December 1834, POL318/1/3, f. 94.

²⁵³ Chief Police Magistrate to the Colonial Secretary, 6 December 1834, POL318/1/3, ff. 95, 97.

²⁵⁴ Chief Police Magistrate to the Colonial Secretary, 6 December 1834, POL318/1/3, f. 97.

²⁵⁵ Conduct record, Robert Browett; Chief Police Magistrate to the Colonial Secretary, 6 December 1834, POL318/1/3, ff. 95-97.

²⁵⁶ Pedder to Arthur, 6 and 9 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁵⁷ Pedder to Arthur, 9 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

discussed the matter with Arthur in person on 6 December, and repeated his anxieties in a letter written that evening. 'I should ever feel so uncomfortable', he told Arthur, 'if my servant Browett ... were to be sent to a road party, especially since it is plain that he is in truth to be sent there for punishment'.²⁵⁸

Browett's situation was complicated by the fact that he was a transportee: his drunken absence was not a criminal offence, but a breach of convict discipline. Yet, he had, as Pedder pointed out, already served the sentence imposed by the magistrate 'for the only faults of which he has been convicted'.²⁵⁹ If Arthur remained determined to impose additional punishment, however, Pedder offered to assume personal responsibility for an alternative penalty: 'I entreat that he may be returned to my service [and] I will undertake to be his gaoler'.²⁶⁰

Pedder's anxiety for Browett is particularly interesting for what it reveals about his capacity for empathy. Perhaps surprisingly for a judge who regularly sentenced prisoners to capital and non-lethal corporal punishments in the Supreme Court, Pedder was deeply concerned about the physical and psychological impact of the road party on Browett. Construction of the Grass Tree Hill road had begun the previous year, and harsh conditions for the convict road gang were exacerbated by inadequate clothing and provisions.²⁶¹ Pedder did not disguise his belief that Browett was 'unequal to the labour and hardships endured by men in the road parties'.²⁶² Implicitly questioning the reformatory value of hard labour, he also feared that to send Browett 'to his present destination would render him either hardened or broken hearted'.²⁶³ Despite

²⁵⁸ Pedder to Arthur, 6 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁵⁹ Pedder to Arthur, 6 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁶⁰ Pedder to Arthur, 6 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁶¹ P. MacFie, 'Dobbers and cobbers: Informers and mateship among convicts, officials and settlers on the Grass Tree Hill Road, Tasmania, 1830-1850', *Tasmanian Historical Research Association Papers and Proceedings* 35 (3) (1988), pp. 113, 116-117.

²⁶² Pedder to Arthur, 6 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁶³ Pedder to Arthur, 6 and 9 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

having refused to take Browett back into his service, Pedder now preferred this to the alternative.

In contrast to his respectable fellow servant, William Rice, Browett was a dissolute recidivist. Moreover, Forster reported, Browett's 'connexions in this Town were of the very worst description ... his habits of life were of the loosest and most immoral Kind, and ... he was a professed Gambler'.²⁶⁴ Forster also had 'strong Grounds for believing ... that Browett had been concerned in two felonies, which had been committed ... during the last Sixteen Months'.²⁶⁵ Pedder had read Forster's report, and had himself sentenced Browett for stealing only five years earlier.²⁶⁶ Ignoring what he knew of Browett's criminality and dissipation, Pedder chose instead to emphasise that he was 'not without good qualities'.²⁶⁷ Browett's convict records do not indicate whether Pedder's advocacy was successful, but the traces of his efforts on his servant's behalf reveal an important dimension to Pedder's character, which is not obvious from his official persona.

Conclusions

Charting Pedder's relationships and interests beyond the bench through the material culture traces of his life confirms that his domestic world was far from austere. With a secure income and an official residence provided by the government, he and Maria lived very comfortably by contemporary colonial standards. *Secheron* and *Newlands* in particular were congenial sites for living and entertaining, and their large pleasure gardens provided a cherished retreat from the stresses of public life. The Pedders' orchards, vegetable and cutting gardens augmented a rich seasonal diet, supplied flowers for the house, and

²⁶⁴ Chief Police Magistrate to the Colonial Secretary, 6 December 1834, POL318/1/3, f. 95.

²⁶⁵ Chief Police Magistrate to the Colonial Secretary, 6 December 1834, POL318/1/3, f. 95.

²⁶⁶ Pedder to Arthur, 9 December 1834, Arthur Papers, vol. 10, ML ZA 2170; *Colonial Times*, 30 October 1829, p. 4.

²⁶⁷ Pedder to Arthur, 6 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

became the focus of John and Maria's shared love of horticulture. Mundane household goods and luxury items also offer insights into Pedder's temperament: he read poetry, enjoyed music, played backgammon, collected prints, drank homemade wine, and famously took snuff. Unlike most settler-colonists of his rank, Pedder did not own land in Van Diemen's Land, and does not seem to have been concerned to leave landed property to his niece or nephew. Large pastoral leases in the Port Phillip District were sold before his return to England, and his will indicates that he focussed on investments in shares.

Pedder's engaging and compassionate personality reflected key aspects of his self-conception as a gentleman: an honourable character and philanthropic action. He was liberal with his servants, generously supported charitable causes, demonstrated compassion towards animals, and was active in his support of child welfare, healthcare, and adult education. Pedder was widely regarded as a model of respectability: upright, dutiful, generous, and well educated. He could also be punctilious and firm in defence of his rights as a gentleman, and managed his reputation according to the rituals of his generation and class. Pedder drew clear boundaries between his personal and professional relationships with people he did not consider his social equals, but also publicly acknowledged his genuine respect for former convicts who demonstrated industry and commitment to their families, and felt compassion for some who did not.

By following the archival 'byways' and reading their traces with sensitivity to the values, practices and concerns of his age, Chapters 3 and 4 illuminate the complexity and variety of Pedder's lived experience. In contrast to his construction as a lonely and dispassionate ascetic who lived only through this work, this approach reveals that he was a sociable man and a sincere friend, whose leisure time was filled with a wide range of activities and interests. It also

demonstrates that, by looking beyond Pedder's official persona to his multiple roles – as a husband, brother, uncle/foster-father, friend, employer, philanthropist, scholar, and gardener – a more nuanced understanding of his values and temperament emerges. The particularity of Pedder's life in Van Diemen's Land also reveals insights into an elite figure, whose unusually secure status and widely acknowledged respectability provided a benchmark for gentlemanly conduct in the colonial space during the second quarter of the nineteenth century.

PART II

'BOUND BY EVERY TIE OF DUTY'

On 16 March 1824, Chief Justice Pedder disembarked in Hobart Town 'under the customary honours' of a thirteen-gun salute and official reception at Government House.¹ Two weeks later, the Royal Charter of Justice was proclaimed, and, on 7 May, Pedder took the oaths of office and allegiance to the Crown.² As the first professional judge in the newly established Supreme Court of Van Diemen's Land, Pedder was responsible for administering English law in the multi-jurisdictional superior court of a penal colony. For the first time since colonisation in 1803, capital offences and complex civil matters could be heard locally, and, as Pedder later described the beginning of his judicial career, he found 'a Gaol full of Prisoners and much litigation calling loudly for the opening of the Court'.³

In addition to his 'incessant and inordinate duties' in the Supreme Court,⁴ Pedder served as an *ex officio* member of the colonial government. As John McLaren's comparative legal histories demonstrate, colonial judges were routinely appointed to the executive and legislative branches of government, where they were required to provide both 'constitutional and legal advice' and 'conservative leadership' within the local administration.⁵ As an official member of the Executive Council from 1825 until 1836, and of the Legislative Council between 1825 and 1851, Pedder advised a series of governors on matters of policy and law, and participated in the executive review of his own criminal sentencing. He was also responsible for certifying or opining that locally initiated legislation was not 'repugnant' to the laws of England.

¹ *Hobart Town Gazette*, 19 March 1824, p. 2.

² E. Campbell, 'Oaths and affirmations of public office', *Monash University Law Review* 25 (1) (1999), pp. 140-141.

³ Pedder to Robert Wilmot Horton, private, 13 September 1825, CO 280/4, f. 272a, AJCP reel PRO 231.

⁴ *Sydney Gazette*, 13 September 1826, p. 3.

⁵ J. McLaren, 'The judicial office ... bowing to no power but the supremacy of the law: Judges and the rule of law in colonial Australia and Canada, 1788-1840', *Australian Journal of Legal History* 7 (2) (2003), p. 182.

Charting the apparently inevitable consolidation of nineteenth-century liberal reforms, conventional histories of Van Diemen's Land/Tasmania struggle to accommodate an avowed Tory, who sent several hundred fellow beings to the gallows.⁶ Part II contextualises and tests two popular and scholarly constructions of Pedder that emerge from these whiggish narratives: a 'hanging judge' and a puppet of government. Tapping in to a growing body of scholarship which demonstrates that the 'achievement of the liberal order' in the British colonial world was 'not the unfolding of a predetermined plot line',⁷ Part II is particularly concerned to acknowledge and engage with Pedder's conservative ideological and professional paradigm. Refocussing on Pedder's perspective in Chapters 5 and 6, a close reading of the chief justice's correspondence and public statements reveals that they are infused with the language of duty – to the law, the Crown, the 'welfare of the people', and, above all, to his judicial office.⁸

Chapter 5 challenges Pedder's posthumous construction as a Tasmanian Judge Jeffreys. Arguing that the trope of the 'hanging judge' belongs to a long literary tradition in which frontier judges are recast as judicial murderers, this chapter charts the capital felony process in Van Diemen's Land to illuminate the legal, political and social frameworks within which Pedder was required to operate during the 'heyday of capital punishment' on the island. Comparison of tabloid 'histories' of the 'hanging judge' with colonial case law, editorial commentary, and Pedder's own comments from the bench and during post-sentencing review, highlights the impact of mandatory sentencing and community expectations during the dying decade of the 'bloody code'. Examining the chief justice's very public emotional responses

⁶ A. Burns and J. Innes, 'Introduction' in A. Burns and J. Innes (eds.), *Rethinking the Age of Reform. Britain 1780-1850* (Cambridge, Cambridge University Press, 2003), p. 21. Tory beliefs were not fixed, but support for the status quo was characteristic.

⁷ P. Girard, 'Liberty, order, and pluralism: The Canadian experience' in J.P. Greene (ed.), *Exclusionary Empire: English Liberty Overseas, 1600 to 1900* (New York, Cambridge University Press, 2009), p. 162.

⁸ Pedder to Arthur, 16 July 1834, Papers of Sir George Arthur, vol. 10, ML ZA 2170, reel MAV/FM4/3671.

to the ‘most painful duty of a judge’,⁹ this chapter also highlights the personal conflict between Pedder’s humanity and his judicial duty, and challenges us to ‘humanise’ a ‘hanging judge’.

Pedder’s construction as a puppet of government is heavily inflected by the discourses of English liberties which inspired local campaigns for constitutional development before self-government in 1856. Challenging modern assumptions around the meaning of judicial independence, Chapter 6 emphasises ‘old, forgotten’ common-law ideals of ‘judicial duty’.¹⁰ Following Philip Hamburger, it distinguishes between ‘internal’ and ‘external’ judicial independence. Similarly, it engages with McLaren’s wide-ranging research which illustrates that colonial judges, appointed ‘at pleasure’, were ‘expected to straddle the legal and political spheres in the cause of stable governance’.¹¹ In contrast to critiques of Pedder’s closeness to government, McLaren’s ‘Baconian colonial judiciary’ model recasts Pedder as the ‘epitome of the loyal, journeyman judge doing what was expected of him’.¹² Revisiting key colonial rule-of-law conflicts – including the touchstone issues of trial by jury and freedom of the press – Chapter 6 argues that Pedder’s successful negotiation of his competing obligations was rewarded with continuing Colonial Office support in an age when judges who failed to internalise a Baconian conception of service to the Crown were regularly removed from office.

⁹ *Hobart Town Advertiser*, 10 June 1859, p. 3.

¹⁰ P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass., Harvard University Press, 2008), p. 16.

¹¹ J. McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900* (Toronto, University of Toronto Press, 2011), p. 149.

¹² McLaren, *Dewigged, Bothered and Bewildered*, p. 160.

CHAPTER 5

A TASMANIAN JUDGE JEFFREYS?

In a recent quantitative survey of the death penalty in early colonial New South Wales, Tim Castle identifies the period 1826 to 1836 as the 'heyday of capital punishment'.¹ The same epithet may be applied to Van Diemen's Land. Where Castle identifies 363 executions in New South Wales during the decade from 1826, approximately 260 prisoners were hanged in Van Diemen's Land in the twelve years from 1824.² As the only Supreme Court judge in Van Diemen's Land between 1824 and 1833, Chief Justice Pedder is inexorably linked to what Hamish Maxwell-Stewart has characterised as the 'appalling rate of judicial carnage' practised during the administration of Governor Arthur (1824-1836).³ Significantly, both Castle and Maxwell-Stewart frame their analyses in terms of gubernatorial policy. Indeed, Castle does not identify any of the New South Wales judges who passed sentences of death during the administrations of Governors Darling (1825-1831) and Bourke (1831-1837). By contrast, Chief Justice Pedder has acquired personal notoriety as a 'hanging judge'.

During the 1820s and early 1830s, settler-colonists in Van Diemen's Land faced particular challenges. Convict numbers were increasing rapidly, and an expanding free settler population demanded protection from a bushranging 'crisis' and escalating frontier conflict with Indigenous people. At the frontiers of settlement and in the towns, property crime and crimes of violence were also commonplace. Policing was problematic, and private individuals were often required to play a more direct role in maintaining order. Criminal trials and public hangings were reported in detail in the

¹ T. Castle, 'Watching them hang: Capital punishment and public support in colonial New South Wales, 1826-1836', *History Australia* 5 (2) (2008), p. 43.2.

² Castle, 'Watching them hang', p. 43.2; R.P. Davis, *The Tasmania Gallows: A Study of Capital Punishment* (Hobart, Cat & Fiddle Press, 1974), p. 13.

³ H. Maxwell-Stewart, "'I could not blame the rangers...': Tasmanian bushranging, convicts and convict management', *Tasmanian Historical Research Association Papers and Proceedings* 42 (3) (1995), p. 117.

colonial press, and the courthouse and gallows regularly attracted crowds of spectators. In the imperial parliament, the criminal law reform movement was gaining momentum,⁴ but strong community expectations around retributive justice persisted at home and in the colonies into the 1830s. Decoupled from this historical context, late-nineteenth and early twentieth-century commentaries cast Chief Justice Pedder as a Tasmanian Judge Jeffreys.

The literary trope of the 'hanging judge' has a long tradition in the Anglophone world, and its seventeenth-century archetype, Judge Jeffreys, has been invoked in a range of frontier contexts. Jeffreys was one of five judges sent to the western assizes in 1685, following the Duke of Monmouth's failed rebellion against James II.⁵ Of approximately 2,600 prisoners detained in the wake of Monmouth's defeat at the Battle of Sedgemoor, 1,381 of his supporters were tried; 200 were ultimately executed.⁶ As Paul Halliday explains, these were 'vicious judicial proceedings in an age that replied viciously to rebellion'; other risings during the Tudor and Stuart periods provoked comparable official reaction.⁷ Soon after the so-called 'Bloody Assizes', Jeffreys was appointed Lord Chancellor, and his loyalty to James II sealed his fate. With the arrival of the Protestant Prince William of Orange in 1688, Jeffreys was sent to the Tower, where he died the following year. Condemned as a traitor, posthumous 'pamphlets of all kinds poured scorn upon' Jeffreys for his association with the late Catholic king.⁸ The most influential of these, John Tutchin's 'sensational' *The Western Martyrology, or,*

⁴ V.A.C. Gatrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford, Oxford University Press, 1996), pp. 21-25, 327-330.

⁵ The illegitimate son of Charles II, Monmouth led a popular rebellion against his Catholic uncles, James II.

⁶ P. Halliday, 'Jeffreys, George, first Baron Jeffreys (1645-1689)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2009, <<http://www.oxforddnb.com/view/article/14702>> accessed 27 January 2011. Most of those convicted were transported to the West Indies.

⁷ Halliday, 'Jeffreys, George, first Baron Jeffreys (1645-1689)', *Oxford Dictionary of National Biography*. Halliday cites those of 1536 (the Pilgrimage of Grace), 1569 (the Rising of the North), and the Jacobite Risings of 1715 and 1745.

⁸ Halliday, 'Jeffreys, George, first Baron Jeffreys (1645-1689)', *Oxford Dictionary of National Biography*.

The Bloody Assizes (1689), shaped constructions of this exemplary 'hanging judge' for the next three hundred years.⁹

Pedder's prominence in the hated Arthur 'regime' similarly inflects his construction as a Tasmanian Judge Jeffreys. Writing a series of 'reminiscences' on the 'dark age of Tasmania' for the Hobart *Mercury* in the 1870s, retired surveyor, James Erksine Calder, invoked the 'hanging judge' with his assertion that Pedder had 'probably passed more death sentences than any other colonial judge living'.¹⁰ Forty years later, a Melbourne tabloid revived the construction in *The History of Tasmania written specially for 'Truth'* (1915). Sensationalising the 'dark deeds of the old convict days', its anonymous author specifically likened Pedder to 'that notorious judicial murderer, Judge Jeffries [*sic*]'.¹¹ In the tradition of Calder, local writer, Carrel Inglis Clark, occupied himself with 'journalistic and fragmented delving into Tasmanian history' for the Hobart press, including a series on the history of the Supreme Court, published in the *Critic* in 1922 and 1923.¹² In an article of 21 April 1922, Clark repeated – and superficially legitimised – the *Truth*'s comparison of Pedder to Judge Jeffreys, attributing its assessment to 'another historian'.¹³ Evidencing its enduring popular appeal, two Sydney newspapers (including a *Truth* stable-mate) revived the construction in the 1970s and 1980s, with sensational headlines like 'Australia's fastest hanging judge', and 'Judge maintained fodder supply to Hobart's gallows'.¹⁴

Pedder's popular construction as a 'hanging judge' has implicit parallels in

⁹ Halliday, 'Jeffreys, George, first Baron Jeffreys (1645-1689)', *Oxford Dictionary of National Biography*.

¹⁰ *Mercury*, 19 August 1873, p. 3; and 19 February 1881, p. 1S; M. Roe, *An Imperial Disaster: The Wreck of the George the Third* (Hobart, Blubber Head Press, 2006), pp. 239, 251.

¹¹ [no author], *The History of Tasmania written specially for 'Truth'*. Compiled from Authentic Sources (Melbourne, Truth Popular Press Print, 1915), 'Preface' [n.p.] and p. 103.

¹² R. Ely (ed.), *Carrel Inglis Clark: The Supreme Court of Tasmania. Its First Century* (Hobart, University of Tasmania Law Press, 1995), p. xxv. Clark also quotes from Calder.

¹³ *Critic*, 21 April 1922, cited in Ely, *Carrel Inglis Clark*, p. 17.

¹⁴ *Sun*, 4 February 1975, p. 14; *Daily Mirror*, 22 August 1986, p. 22; cited in J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), pp. 64, 124. The *Daily Mirror* was owned by *Truth*.

more scholarly treatments of the death penalty in Van Diemen's Land. As Randall McGowen highlights, the historiography of capital punishment in the abolitionist common-law world is characterised by 'ameliorist narratives' which 'unreflectively credit the present with more humanity than the past'.¹⁵ This tendency is particularly evident in the few existing analyses of Pedder's role in the Supreme Court and Executive Council. In the only substantial study of capital punishment on the island, historian Richard Davis routinely contrasts the 'savage punishments' of the early colonial period with 'modern enlightened opinion'.¹⁶ Accusing the chief justice of 'a naïve and callous utilitarianism',¹⁷ Davis asserts that there is 'no indication ... Pedder was concerned about the frequent application of the death penalty'.¹⁸ By contrast, Pedder's judicial biographer argues that the chief justice 'could never shut his mind to the finality of capital punishment'.¹⁹ Highlighting Pedder's evident discomfort at pronouncing sentence of death, J.M. Bennett refutes his bloodthirsty reputation (particularly as propounded by Calder) as 'virtually the antithesis of the truth'.²⁰

To explore the evolution of Pedder's construction as a Tasmanian Judge Jeffreys, this chapter poses two key questions: how did the trope of the 'hanging judge' come to be applied to the chief justice? And, what does it reveal about the changing social meanings of capital punishment in the century following his appointment to the bench? Using contemporary press commentary and Pedder's own correspondence, this chapter also teases out something of the impact of capital punishment on the judge himself. A detailed quantitative analysis of the criminal proceedings of the Supreme Court is beyond the scope of this study, and it makes no attempt accurately to

¹⁵ R. McGowen, 'Revisiting *The Hanging Tree*: Gatrell on emotion and history', *British Journal of Criminology* 40 (1) (2000), p. 8.

¹⁶ The ameliorist perspective is clearly reflected in Davis' language: he writes about 'civilised countries', the 'slow growth of humanitarian feeling', 'faults far short of murder', and a 'more rational society', and fears 'regression to pre-Enlightenment attitudes'. Davis, *The Tasmanian Gallows*, pp. xiii, xiv, 23, 24, 26, 28, 29, 31.

¹⁷ Davis, *The Tasmanian Gallows*, p. 26.

¹⁸ Davis, *The Tasmanian Gallows*, p. 24.

¹⁹ Bennett, *Sir John Pedder*, p. 62.

²⁰ Bennett, *Sir John Pedder*, pp. 63-64, 66.

quantify the numbers of prisoners tried, executed or reprieved during Pedder's long judicial tenure.²¹ Indeed, as this data does not form the basis of his reputation as a 'hanging judge',²² it will be more useful to explore how archival evidence has been deployed qualitatively to support this construction.

This examination concentrates on the period 1824 to 1836 for several key reasons. As Davis identifies, more than half of all state-sanctioned executions on the island were ordered during this period.²³ With the appointment of Chief Justice Pedder and the foundation of the Supreme Court in 1824, the professionalisation of the administration of justice in the colony coincided with the dying decade of the 'bloody code'. In 1827, Home Secretary, Robert Peel, introduced a suite of consolidated legislation that drastically reduced the number of capital offences.²⁴ At the same time, shifting public attitudes towards capital punishment were reflected in a vocal colonial press. Initially promoting the salutary terror of the scaffold, Hobart Town pressmen later

²¹ Tim Castle's database of people sentenced to death in New South Wales provides a potential model for a comparable Van Diemen's Land database and online platform, which could facilitate future comparative research, and be further enhanced with hyperlinks to the online transcriptions of colonial case law edited by Stefan Petrow and Bruce Kercher. Similarly, proposed linkages between the *Founders and Survivors* project and the *Old Bailey Proceedings Online* will be enormously valuable for facilitating comparative research. See *Capital Punishment Database: NSW 1826-1837 (Castle Database)*, Francis Forbes Society for Australian Legal History, <<http://research.forbessociety.org.au/>>; B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <<http://www.law.mq.edu.au/sctas/>>; *Founders and Survivors: Australian Life Courses in Historical Context, 1803-1920*, <<http://www.foundersandsurvivors.org/>>; and *Old Bailey Online – The Proceedings of the Old Bailey, 1674-1913*, <www.oldbaileyonline.org> accessed 21 February 2011.

²² Clark provides some limited quantitative data on the Supreme Court, drawn from the *Statistic Relations of Van Diemen's Land, 1824-1835*. *Critic*, 5 May 1922, cited in Ely, *Carrel Inglis Clark*, p. 13.

²³ Davis, *The Tasmanian Gallows*, p. 13. The first executions took place in 1806; the last in 1946. Capital punishment was formally abolished in Tasmania in 1968.

²⁴ Referred to collectively as 'Mr Peel's Acts', they encompassed 7 & 8 Geo. IV, c. 27, *Criminal Statutes (Repeal) Act* (1827); 7 & 8 Geo. IV, c. 28, *Previous Convictions (Proof) Act*; 7 & 8 Geo. IV, c. 29, *Larceny Consolidation Act* (1827); 7 & 8 Geo. IV, c. 30, *Malicious Injuries to Property Act* (1827); 9 Geo. IV, c. 31, *Offences against the Person Act* (1828); and 11 Geo. IV & 1 Will. IV, c. 66, *Forgery Act* (1830). See *The Late Acts of Parliament amending the Criminal Law of England commonly called Peel's Acts* (Hobart Town, J. Ross, 1830); G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Sydney, The Federation Press, 2002), pp. 117-124.

unfavourably compared local practices with the more 'humane' punishments imposed for the same offences in England. Finally, 1836 marks the end of Pedder's extra-curial role in Executive Council review of his own capital sentencing.

Historian and thanatographer, Carolyn Strange, has observed that, 'Analyzing [*sic*] public pronouncements and tracking legislation over time is the standard method of plotting changes in attitudes toward crime, punishment, and the administration of justice'.²⁵ Highlighting the statutory framework behind the operation of the 'bloody code' in Van Diemen's Land, section 5.1 focuses on the institutions and processes through which the criminal law was enforced. Tracing the 'capital felony process' from arrest to execution,²⁶ this section uses the records of the Supreme Court, Executive Council, and colonial press to identify the range of capital offences tried by Pedder, the sentencing options available to him, and the factors which influenced his recommendations for mercy during post-sentencing review.

Against this necessary background, section 5.2 examines literary sources which introduce and consolidate posthumous portrayals of Pedder as a 'hanging judge'. Aimed at popular audiences, the newspaper 'histories' produced by James Erskine Calder, and the tabloid *History of Tasmania written specially for 'Truth'* denounce Pedder as an enthusiastic agent of the gallows regime. Specific examples from these texts are compared with contemporary editorial comment, statute and common law, and the minutes of Executive Council review to illustrate how these narratives simultaneously overestimate Pedder's power of life and death and underplay the social meaning of capital punishment during a period characterised by declining, but still significant, support for the ultimate sanction.

²⁵ C. Strange, 'The undercurrents of penal culture: Punishment of the body in mid-twentieth-century Canada', *Law and History Review* 19 (2) (2001), pp. 344-345.

²⁶ D.J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Oxford, Clarendon Press, 1998), p. 5.

In contrast to the bloodthirsty judicial murderer conjured by Calder and the *Truth*, the evidence of the colonial archive challenges us to humanise the ‘hanging judge’. Newspaper reports of capital cases regularly cited Pedder’s tearful displays of emotion on the bench as evidence of his ‘humanity’, while the chief justice’s own correspondence suggests that he was deeply affected by the responsibility of imposing sentence of death. Offering a limited counterpoint to Vic Gatrell’s construction of judges as ‘emotionally crippled beings’, section 5.3 highlights the palpable conflict between Pedder’s duty as a judge and his humanity as a man.

5.1 Background: the ‘bloody code’ in Van Diemen’s Land

When Pedder began his judicial career in Hobart Town in 1824, more than 200 criminal offences remained punishable by death, under a system of common and statute law characterised by historians as the ‘bloody code’.²⁷ Grave offences, like murder and treason, attracted mandatory sentence of death. However, all capital convictions were potentially subject to review, and many death sentences were pardoned or commuted when the prerogative of mercy was exercised by the king (or his colonial delegates), often in response to petitions for clemency from patrons or friends of the condemned person. From 1823, the *Judgment of Death Act* authorised additional discretionary sentencing for non-murder offences in cases where the prisoner was ‘a fit and proper Subject to be recommended to the Royal Mercy’.²⁸ The formal sentence of ‘death recorded’ was commuted to imprisonment or transportation from the bench. Courts could also exercise considerable discretion in sentencing for non-capital offences, which attracted a range of penalties including fines, sureties for good behaviour, public whipping, branding, imprisonment and transportation.

²⁷ D.J. Bentley, *English Criminal Justice in the Nineteenth Century* (London, The Hambledon Press, 1998), p. 11; L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750. Vol. I* (London, Stevens, 1948), pp. 4-5.

²⁸ 4 Geo. IV, c. 48, *An Act for enabling Courts to abstain from pronouncing Sentence of Death in certain Capital Felonies*, ss. 1, 2.

Since the early eighteenth century, transportation by direct sentencing or as a condition of royal mercy had been an important sanction for serious offences in Britain and her colonies.²⁹ As a place of transportation, Van Diemen's Land embodied this alternative to capital punishment; however, public execution soon became a prominent feature of colonial justice. Before the opening of the Supreme Court in 1824, no local court had jurisdiction to try offences punishable by death.³⁰ Instead, cases were heard in the Supreme Court of New South Wales at Sydney, or during that court's infrequent circuits to the island. In an age which lauded the salutary terror of the scaffold, many offenders sent to Sydney for trial were returned to Van Diemen's Land for public execution during the 1810s and early 1820s.³¹

From May 1824, offenders could be processed locally. Governed by common-law conventions and statute law, the capital felony process ranged from arrest, to indictment, plea, trial, conviction, judgement and post-sentencing review by the Executive Council. On the advice of the chief justice and other nominated Councillors, the lieutenant-governor could exercise mercy, or refer cases to London for further consideration.³² Where no reprieve or pardon was granted, the capital felony process ended with public execution by hanging. In the case of murderers, execution was generally followed by post-mortem practices of anatomisation (dissection) or hanging in chains (gibbeting), in order that 'some further Terror and peculiar Mark of Infamy be added to the Punishment' of death.³³

In an era before professional police and public prosecution services, the detection and punishment of crime relied on community participation,

²⁹ B. Kercher, 'Perish or prosper: The law and convict transportation in the British Empire, 1700-1850', *Law and History Review* 21 (3) (2003), p. 527.

³⁰ Local responses to crime had been limited to the summary justice of lay magistrates and extra-legal executions sanctioned under martial law.

³¹ Davis, *The Tasmanian Gallows*, p. 12. At the 'first mass execution' in 1821, ten men convicted in the Supreme Court of New South Wales were hanged in Hobart Town for a range of non-murder offences, including animal stealing and robbery with violence.

³² HRA I, XII, pp. 124, 644-645. Before the administrative separation of Van Diemen's Land from New South Wales in December 1825, cases were reviewed in Sydney.

³³ 25 Geo. III, c. 37, *An Act for Better Preventing the Horrid Crime of Murder* (1752).

especially in a nascent settler society with limited manpower. While Governor Arthur introduced a 'highly centralised system' of police constables under the control of paid magistrates in the mid-1820s,³⁴ private citizens were also required to assist when the hue and cry was raised, as the residents of Hobart Town were reminded in 1824. In a 'proceeding of great public importance', James Hogg was found guilty of 'refusing to assist a Constable in the execution of his office'.³⁵ Alluding to the 'general opinion, that no *free* person could be legally obliged to aid in the apprehension of a culprit', Attorney-General, J.T. Gellibrand, declared, 'That opinion was false! Every person, high or low, rich or poor, bond or free, was bound to do so'.³⁶ Any man who 'denied his aid to an officer in discharge of his duty' committed 'a crime ... to which our Law had assigned the punishment of fine and imprisonment'.³⁷ For his 'ignorance of the law', Hogg was fined 20 shillings and 'imprisoned for the space of *five minutes*' in Hobart Town Gaol.³⁸

Following arrest, during pursuit or by warrant, prisoners awaiting trial in the Supreme Court were detained in the local town gaol. This complex served multiple functions: holding offenders awaiting trial or sentencing; incarcerating convicted felons; detaining debtors; and confining women prisoners in the Female House of Correction. Criminal trials were held at Sessions of Oyer and Terminer and General Gaol Delivery in Hobart Town, Launceston and Oatlands, during which the judge was authorised to 'enquire, hear and determine' all offences within his jurisdiction, and all prisoners held in the gaol were to be 'tried, punished or delivered'.³⁹ Replicating the practice

³⁴ S. Petrow, 'Policing in a penal colony: Governor Arthur's police system in Van Diemen's Land, 1826-1836', *Law and History Review* 18 (2) (2000), pp. 354-355.

³⁵ R. v. Hogg [1824], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_hogg/> accessed 1 December 2011; Archives Office of Tasmania (hereafter AOT) Register of prisoners discharged by proclamation, 24 May 1824-7 June 1827, SC45/1/1, case no. 45, f. 13, reel Z225; *Hobart Town Gazette*, 2 July 1824, p. 2.

³⁶ *Hobart Town Gazette*, 2 July 1824, p. 2.

³⁷ *Hobart Town Gazette*, 2 July 1824, p. 2. Original emphasis.

³⁸ *Hobart Town Gazette*, 2 July 1824, p. 2. Original emphasis.

³⁹ W. Blackstone, *Commentaries on the Laws of England*, Book 4, Chapter 19 (Oxford, The Clarendon Press, 1765-1769), pp. 266-268.

of the English assizes and the Old Bailey, prisoners convicted of non-murder offences in the Supreme Court were returned to the gaol to await sentencing, 'in batches', at the 'judgement days' held at the end of a criminal session.⁴⁰ Murderers were generally sentenced upon conviction, or soon afterwards.

In 1825, the *Hobart Town Gazette* reminded readers that the new Supreme Court had 'cognizance of all crimes from the highest treason to the lowest misdemeanour'.⁴¹ The common-law world (outside the United States) no longer distinguishes between felonies and misdemeanours; however, this distinction remained important during the early colonial period. Defined by statute or common law, felonies were (or had been) punishable by death, forfeiture of property, or corruption of the blood.⁴² Indeed, many Van Diemen's Land convicts, whose original sentence of death had been commuted to transportation by royal pardon, technically remained subject to the felony attain rule until the expiry of their sentence.⁴³ Misdemeanours were considered less grave than felonies and were punished with a range of non-capital sanctions.

To aid comparative analysis, this study employs the nine modern categories of crime developed by the *Old Bailey Proceedings Online*: breaking the peace, damage to property, deception, killing, offences against the King (Queen), sexual offences, theft, theft with violence, and other offences.⁴⁴ Table 1, below, illustrates the variety of offences tried in the Supreme Court during the first three Sessions of Oyer and Terminer, between May 1824 and June 1827.

⁴⁰ Bentley, *English Criminal Justice in the Nineteenth Century*, p. 278.

⁴¹ *Hobart Town Gazette*, 22 July 1825, p. 4.

⁴² C. Emsley, T. Hitchcock and R. Shoemaker, 'Crimes tried at the Old Bailey: Explanations of types and categories of indictable offences', *Old Bailey Proceedings Online*, <<http://www.oldbaileyonline.org/static/Crimes.jsp>> accessed 14 January 2011; Blackstone, *Commentaries*, Book 4, Chapter 7, p. 95.

⁴³ For practical reasons, the felony attain rule was not applied as rigorously in the colonies as it was in England. Kercher, 'Perish or prosper', p. 537.

⁴⁴ Emsley, Hitchcock and Shoemaker, 'Crimes tried at the Old Bailey'.

Category of offence	Specific offences
Breaking the peace	assault; assaulting a constable in the execution of his duty; assault and false imprisonment on the high seas; assaulting and stabbing; challenging to fight; conveying the challenge; cutting and maiming; libel; maliciously shooting at ; maliciously shooting on the high seas with intent to kill; putting in fear (by gestures or shouting); stabbing with intent to kill
Damage to property	arson
Deception	cheating; cheating and defrauding; forgery; forging and counterfeiting; forging and uttering as true a certain Bill of Exchange; forging and uttering and publishing as true, promissory notes; fraud; obtaining goods under false pretences; obtaining money under false pretences; offering and putting away a promissory note with intent to defraud; perjury
Killing	assault with intent to commit murder; manslaughter; murder; murder, accessory before the fact
Offences against the King (Queen)	coining; seditious libel; a breach of the Custom laws ... evading the prescribed duty
Sexual offences	aiding and abetting rape; assault with intent to commit rape; rape; assault upon an infant under the age of ten years with intent to carnally know her; bestiality; sodomy
Theft	accessory after the fact; animal theft [cattle stealing, horse stealing, sheep stealing]; burglary; embezzlement; housebreaking; killing [an animal] with intent to steal the carcass; larceny in a boat; larceny in a dwelling house; larceny from the person; receiving stolen goods; privately stealing in a shop [shoplifting]; privately stealing in a warehouse; stealing in a dwelling house; stealing in a dwelling house and putting in fear; stealing from [one's] master
Theft with violence	highway robbery; robbery; robbery from the person; robbery from the prison
Other offences	concealment of birth; piracy; piracy on the high seas

Table 1: Offences tried in the Supreme Court of Van Diemen's Land, 1824-1827.⁴⁵

Quantitative analysis of the records of the Supreme Court has the potential to make a valuable contribution to the growing body of comparative histories of crime and punishment across the common-law world. Here, a rudimentary overview of the first three Sessions of Oyer and Terminer provides some local context for Pedder's work as a trial judge. Colonial records indicate that theft offences represented by far the greatest proportion of the court's case load, at around 77 *per cent* of all charges heard between May 1824 and June

⁴⁵ AOT SC45/1/1, ff. 1-133, reel Z225.

1827.⁴⁶ Deception offences were the next largest category, at around 6 *per cent*. In contrast to extensive press and historiographical commentary on the libel trials of newspaper editors,⁴⁷ and widespread public anxiety about crimes of violence, indictments for offences against the King (Queen), and for breaking the peace, killing, and sexual offences were comparatively infrequent.

Under the imperial Act which established the Supreme Court of Van Diemen's Land, criminal offences were prosecuted by 'Information in the Name of His Majesty's Attorney General'.⁴⁸ As J.T. Gellibrand explained his role during the first criminal prosecution in 1824, 'To me is entrusted one of the most painful offices which can be sustained by any individual; added to which, I have to exercise the [accusatorial] functions of a Grand Jury'.⁴⁹ At the beginning of a trial, the indictment was read by the attorney-general and, having been thus arraigned at the bar, prisoners were required to enter a plea.⁵⁰ A plea of general issue (not guilty) allowed evidence to be adduced in court; a guilty plea precluded the hearing of evidence in mitigation.⁵¹ Chief Justice Pedder occasionally appointed defence counsel for those who could not afford a barrister;⁵² however, prisoners were not automatically entitled to legal representation. As late as 1842, puisne judge, Algernon Montagu, regretted that the Supreme Court of Van Diemen's Land 'did not possess the power to appoint a counsel, though it certainly would be desirable that, in capital cases, such authority should be vested in it as was usual at home'.⁵³

⁴⁶ AOT SC45/1/1, ff. 1-133, reel Z225.

⁴⁷ See Chapter 5.3.

⁴⁸ 4 Geo. IV c. 96, s. 4, *An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto* (1823), commonly referred to as the *New South Wales or 1823 Act*.

⁴⁹ *Hobart Town Gazette*, 28 May 1824, p. 2.

⁵⁰ Few criminal indictments from the Supreme Court of Van Diemen's Land survive from before c. 1831.

⁵¹ Blackstone, *Commentaries*, Book 4, Chapter 26, pp. 332-333.

⁵² See, for example, *R. v. Jack and Dick* [1826], discussed at Chapter 7.3.

⁵³ *R. v. Mansfield* [1842], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/r_v_

In the absence of defence counsel, Pedder followed the older English practice of acting 'as he is legally supposed to be, the Counsel for the accused'.⁵⁴

Reports from the colonial press indicate that, unlike the Old Bailey in London, where average trial lengths had diminished to 'eight and a half minutes' by 1833,⁵⁵ Supreme Court cases were often heard over many hours. Sittings usually began at 10 am and continued to 4 pm, but some trials continued well into the night. In February 1830, for example, Michael Best was convicted of wilful murder after a trial lasting fifteen hours. Evidence was heard from 10 am until 10 pm, when Pedder summed up for 'near three hours'.⁵⁶ After deliberating for ten minutes, the jury returned a guilty verdict at one o'clock in the morning, with the court still 'crowded to excess'.⁵⁷ Later that year, the 'very extraordinary' murder trial of Charles Routley 'lasted from 10 o'clock on Tuesday to nearly 4 o'clock on Wednesday morning'.⁵⁸ After hearing evidence from numerous witnesses over the space of fifteen hours, Pedder again summed up for almost three hours, before the jury finally deliberated for 'about a quarter of an hour'.⁵⁹

Under the *New South Wales Act* (1823), a jury of 'seven commissioned officers of His Majesty's sea or land forces' was empanelled to decide on

mansfield/> accessed 23 November 2011. The imperial parliament had passed the *Prisoners' Defence Counsel Act* in 1836; however, the Hobart Town press complained that the 'Colonial Government thinks proper to pick and chose such of [new] British Laws ... as the people are to have the benefit of'. R. v. Guillem [1837], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1837/r_v_guillem/> accessed 23 November 2011.

⁵⁴ *Colonial Times*, 26 May 1826, p. 2.

⁵⁵ T. Hitchcock and R. Shoemaker, *Tales from the Hanging Court* (London, Hodder Education, 2007), pp. 162, 165.

⁵⁶ R. v. Best [1830], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1830/r_v_best/> 23 November 2011.

⁵⁷ R. v. Best [1830].

⁵⁸ R. v. Routley [1830], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1830/r_v_routley/> accessed 23 November 2011.

⁵⁹ R. v. Routley [1830].

questions of fact in criminal trials.⁶⁰ As with civilian juries in England, colonial military juries could return a verdict of guilty, or acquit the prisoner, based on the evidence adduced at trial. Juries unwilling to convict on a capital charge could also exercise 'pious perjury' to prevent a prisoner being condemned to death, as, for example, when jurors deliberately valued stolen goods below the capital threshold of 40 shillings, even when stolen currency had a face value above this limit.⁶¹

Another stratagem was to reduce the charge to a lesser offence through a 'partial verdict'. In *R. v. Buckley* [1824], for example, the original charge of murder was reduced to the non-capital charge of manslaughter by the jury.⁶² In March 1823, James Buckley had struck fellow convict Solomon Booth on the head with a 'thick stick' during a drunken quarrel; Booth did not regain consciousness and died the following day.⁶³ At Buckley's murder trial in May 1824, Chief Justice Pedder reminded the jury that 'murder and malice were inseparable', and explained that 'our law contemplated two kinds of malice, that which was premeditated, and that which was impliable from the weapons used in a quarrel'.⁶⁴ Clearly mindful of the manner of Booth's death, Pedder emphasised the point of law, declaring that he 'who struck his fellow creature with such a weapon as must in probability destroy life, was construed to bear malice; and if death resulted he would be a murderer'.⁶⁵

Ignoring Pedder's instructions on this legal nicety, the jury made several attempts to return a partial verdict. Their first finding, that Buckley was

⁶⁰ 4 Geo. IV c. 96, s. 4. Colonial *Jury Acts* of 1830, 1834 and 1840 extended the use of civilian juries. D. Shea, 'The Supreme Court of Van Diemen's Land (1824-1856)', *Australian Law Librarian* 11 (3) (2003), p. 229.

⁶¹ Hitchcock and Shoemaker, *Tales from the Hanging Court*, pp. 165-166.

⁶² *R. v. Buckley* [1824], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_buckley/> accessed 1 January 2012. A non-capital form of unlawful killing, manslaughter was differentiated from murder by the absence of malice. Blackstone, *Commentaries*, Book 4, Chapter 14, p. 191.

⁶³ *Hobart Town Gazette*, 29 March 1823, p. 2; 4 June 1824, p. 2.

⁶⁴ *Hobart Town Gazette*, 4 June 1824, p. 2.

⁶⁵ *Hobart Town Gazette*, 4 June 1824, p. 2.

'Guilty [of murder], but not with premeditated malice ... nullified itself', as did the second verdict of 'Guilty, but not with malice'.⁶⁶ Only after 'renewed directions as to the form of verdicts' did the jury finally find Buckley guilty on the lesser charge of manslaughter.⁶⁷ Traditional sanctions included 'burning in the Hand' and 'other Punishments'; however, an imperial Act of 1822 had extended the penalties for manslaughter to transportation 'for any Term of Years, as the Court ... shall adjudge'; imprisonment, with or without hard labour, for up to three years; or 'a pecuniary Fine'.⁶⁸ Exercising his judicial discretion – and apparently reflecting his own impression that Buckley had committed murder – Pedder imposed the maximum penalty for this offence, condemning Buckley to secondary transportation 'for the term of his natural life'.⁶⁹

Historians of capital punishment frame responses to crime along a continuum of conflict and consensus models of social order.⁷⁰ Where the

⁶⁶ *Hobart Town Gazette*, 4 June 1824, p. 2. Original emphasis.

⁶⁷ *Hobart Town Gazette*, 4 June 1824, p. 2.

⁶⁸ 3 Geo. IV, c. 38, *An Act for the further and more adequate Punishment of Persons convicted of Manslaughter, and of Servants convicted of robbing their Masters, and of Accessories before the Fact to Grand Larceny, and certain other Felonies* (1822), s. 1.

⁶⁹ *Hobart Town Gazette*, 6 August 1824, p. 2.

⁷⁰ T.D. Miethe and H. Lu, *Punishment: A Comparative Historical Perspective* (Cambridge, Cambridge University Press, 2005), pp. 16-17, 195-196. Key scholars who focus on power relations include E.P. Thompson and Douglas Hay. See E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, Penguin Books, 1977); and Hay's seminal 1975 essay, 'Property, authority and the criminal law', which remains highly influential, but cf. Hay's conservative critic, John Langbein. D. Hay, 'Property, authority and the criminal law' in D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson, and C. Winslow (eds.), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, A. Lane, 1975), pp. 17-63; and J. Langbein, 'Albion's fatal flaws', *Past and Present* 98 (1983), pp. 96-120. Focussing on administrative processes, John Beattie and Peter King emphasise alternative sanctions, such as transportation. More recently, research by Carolyn Strange and Simon Devereaux, among others, explores the complex issues around pardoning. See J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Oxford, Clarendon Press, 1986); P. King, *Crime, Justice and Discretion in England, 1740-1820* (Oxford, Oxford University Press, 2000); C. Strange (ed.), *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver, University of British Columbia Press, 1996); and S. Devereaux and P. Griffiths (eds.), *Penal Practice and Culture, 1500-1900: Punishing the English* (Basingstoke, Palgrave Macmillan, 2004). In another seminal text, Vic Gatrell shifts his focus to an emotion-centred reading of the gallows regime. See Gatrell, *The Hanging Tree*. The consensus model is well represented in the scholarship of Randall McGowen, among others. See R. McGowen, 'A powerful sympathy: Terror, the prison and humanitarian reform in early nineteenth-century Britain', *Journal of British Studies* 25 (3) (1986), pp. 312-334; 'From pillory to gallows: The punishment of forgery in the age of the financial revolution', *Past and Present* 165 (1999), pp. 107-140; and 'The body and

conflict model privileges power relations, the consensus model assumes shared community norms and a 'collective intolerance of particular offences'.⁷¹ The popular and scholarly treatments of capital punishment which have contributed to Pedder's reputation as a 'hanging judge' typically fail to acknowledge the complex and intersecting range of 'penal purposes', which Simon Devereaux usefully characterises as a 'triad', encompassing 'retributive severity, deterrent terror, and reform'.⁷² Instead, conventional accounts of the convict period in Van Diemen's Land overwhelmingly privilege the 'trivial offenders theory',⁷³ and favour subjective and emotive readings in which the penalties for certain offences are decoupled from their political, economic and statutory context.

The only standard reference on the local application of the death penalty, Davis' *The Tasmanian Gallows*, illustrates this point. Condemning the 'savage' punishment of death for stealing cattle, sheep, or horses, Davis asserts that, 'It is difficult to see the theft of livestock in the 1820s as more morally reprehensible than tax evasion today [1974]'.⁷⁴ Stock theft and tax evasion are not morality offences, however, but legislatively determined economic crimes. Davis' value-laden statement not only implicitly minimises the gravity of the historical felony, but also fails to compare it with a like offence. Moreover, the respective impact of the two offences in communities with vastly different economic structures means that the standards of 1974 cannot be meaningfully applied to the pre-industrialised 1820s. At the risk of

punishment in eighteenth-century England', *Journal of Modern History* 59 (1987), pp. 651-79.

⁷¹ Miethe and Lu, *Punishment*, pp. 16-17, 195-196. Miethe and Lu argue that there is no clear correlation between public opinion and 'actual execution practices', as evidenced by the fact that public support for capital punishment (for certain offences) remains high in abolitionist countries like Australia and the United Kingdom, despite the fact that no executions have been carried out for many decades.

⁷² S. Devereux, 'In place of death: Transportation, penal practices, and the English state, 1770-1830' in C. Strange (ed.), *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver, University of British Columbia Press, 1996), pp. 56, 72.

⁷³ D. Oxley, 'Counting the convicts: The unlikely love affair between convicts and historians' in D. Gare and D. Ritter (eds.), *Making Australian History: Perspectives on the Past since 1788* (Melbourne, Thomson, 2007), p. 116; A. Alexander, *Tasmania's Convicts: How Felons built a Free Society* (Sydney, Allen & Unwin, 2010), pp. 215-218.

⁷⁴ Davis, *The Tasmanian Gallows*, p. 26.

reading like an apologia for capital punishment,⁷⁵ this study argues that identifying the cultural and legislative bases of the death penalty in the early nineteenth century common-law world is a vital foundation for interpreting the paradigm in which Pedder and his contemporaries operated.

Miethe and Lu's comparative sociological perspective on punishment provides a more objective and useful frame, which recognises the shifting sensibilities and practices of penal philosophy, and highlights the need for detailed quantitative research to identify 'context-specific punishment responses' across time and place.⁷⁶ In this model, offences are categorised as *mala en se* and *mala prohibita*. *Mala en se* offences are inherently wrong and 'said to violate widely held public standards of morality'.⁷⁷ These include murder, rape, and particular forms of theft. Capital sentencing is often mandatory for these offences, and greater constraints are applied to the exercise of mercy. *Mala prohibita* offences are legislatively 'defined as illegal' for political, religious, or social reasons, or in response to a particular threat.⁷⁸ They include morality offences (e.g. adultery and sodomy) and economic offences, which attract greater flexibility in sentencing and the application of mercy.

Table 2, below, identifies the sentencing options available to Pedder in the mid-1820s, with examples drawn from the first three Sessions of Oyer and Terminer. Following Miethe and Lu, penalties are categorised as economic sanctions, non-lethal corporal punishments, incapacitative sanctions, capital punishment, and post-mortem punishments.

⁷⁵ cf. Hay's conviction that writing about capital punishment is 'necessarily a political act', and Strange's caution about the 'false historiographical dichotomy between critics and apologists of punishment regimes'. D. Hay, 'Writing about the death penalty', *Legal History* 10 (1/2) (2006), pp. 38-39; and C. Strange, 'Introduction' in C. Strange (ed.), *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver, University of British Columbia Press, 1996), p. 8.

⁷⁶ Miethe and Lu, *Punishment*, p. 210.

⁷⁷ Miethe and Lu, *Punishment*, p. 195.

⁷⁸ Miethe and Lu, *Punishment*, p. 195.

Class of sanction	Penalty	Explanation of penalty
Economic sanctions	Pecuniary fine	Fines ranged from 1 shilling to £200, depending on the offence and the prisoner's ability to pay.
	Recognizance and sureties for good behaviour	Recognizance of up to £200, with sureties of up to £100 each 'for good behaviour' for a specified period, e.g. 12 months.
Non-lethal corporal punishments	Public whipping	To be publicly whipped 'at the cart's-tail' along a specified route through the town.
	Branding (burning in the hand), with a successful plea of benefit of clergy, or for manslaughter	Sentence of death was not carried out in 'clergiable' capital offences. Benefit of clergy could be claimed only once. It was abolished in 1827. Branding was also a traditional punishment for manslaughter.
Incapacitative sanctions	Imprisonment, with or without hard labour	Terms of imprisonment typically ranged from several months to several years. Brief periods of imprisonment were also combined with fines, recognizances and sureties for good behaviour.
	Transportation, to a penal station in Van Diemen's Land or New South Wales	'To be transported to a location at the Lieutenant Governor's discretion' for 7 or 14 years, or 'for the term of his natural life'. For a convict already under sentence of transportation from Britain, this constituted secondary transportation.
Capital punishment	'Death recorded'	Under the <i>Judgment of Death Act</i> (1823), formal sentence of death was recorded, but commuted to imprisonment or transportation by the judge.
	Death by public execution (hanging)	'To be hanged' in the town gaol or, occasionally, at a location near the scene of the crime as a particular deterrent.
Post-mortem punishments	Death by public hanging plus anatomisation (dissection) or hanging in chains (gibbeting)	The <i>Murder Act</i> (1752) provided for mandatory sentence of death plus anatomisation or hanging in chains. Following execution, bodies were delivered to the colonial surgeon for dissection, or (very rarely) gibbeted in a public space near the scene of the crime.

Table 2: Range of penalties imposed by Chief Justice Pedder, 1824-1827.⁷⁹

Castle's study of New South Wales demonstrates that in-principle support for the use of capital punishment was a 'constant feature' of newspaper editorials and execution narratives during the 1820s.⁸⁰ Hobart Town pressmen replicated the sentiments of their Sydney colleagues. Reporting the execution of Alexander Pearce 'for *murder!*' in July 1824 – in the first public hanging ordered by Pedder – the *Hobart Town Gazette* unambiguously

⁷⁹ AOT SC45/1/1, ff. 1-133, reel Z225.

⁸⁰ Castle, 'Watching them hang', p. 43.5.

supported retributive justice and the deterrent value of the gallows. In the biblically inflected language typical of contemporary executive narratives, the *Gazette* declared:

We trust that these awful and ignominious results of disobedience to law and humanity will act as a powerful caution ; for blood must expiate blood ! and the welfare of society imperatively requires, that all whose crimes are so confirmed, and systematic, as *not* to be redeemed by lenity, shall be pursued in vengeance and extirpated with *death* !⁸¹

While the notorious case of the ‘cannibal convict’ generated (and continues to elicit) particular horror and fascination,⁸² reporting of more quotidian offences reveals that press support for capital punishment extended to less sensational, non-murder convictions. Celebrating the ‘annihilation’ of the bushrangers who plagued the colony in the mid-1820s, for example, the *Colonial Times* lamented that settler-colonists had ‘been compelled to witness ... the dreadful procession of the Sheriff, proceeding to demand some unhappy wretch to expiate his crimes by an ignominious death’.⁸³ The retributive and deterrent values of capital punishment, however, were not fundamentally questioned. Referring to the companion crime of sheep stealing, the *Colonial Times* further noted that ‘numerous melancholy examples’ had also been made of the ‘depredators’ who depleted the flocks of settler-capitalists.⁸⁴ In an editorial which resonated with the fears of this readership, the *Colonial Times* did not argue against the effectiveness of the death penalty, but rather for better detection of crime, urging that a ‘more vigilant and active civil force [be] stationed in the interior, for the protection of the property of the Settlers’.⁸⁵

⁸¹ *Hobart Town Gazette*, 24 July 1824, p. 2. Original emphasis.

⁸² See, for example, D. Sprod, *Alexander Pearce of Macquarie Harbour: Convict, Bushranger, Cannibal* (Hobart, Cat and Fiddle Press, 1977); and P. Collins, *Hell's Gates: The Terrible Journey of Alexander Pearce, Van Diemen's Land Cannibal* (South Yarra, Hardie Grant Books, 2002).

⁸³ *Colonial Times*, 5 January 1827, p. 2.

⁸⁴ *Colonial Times*, 5 January 1827, p. 2.

⁸⁵ *Colonial Times*, 5 January 1827, p. 2.

Within the English legal traditions imported to Van Diemen's Land in the early colonial period, prevailing punishment philosophies embraced both specific retribution and general deterrence. Citing the most influential conservative theorist of the age, Vic Gatrell reminds us of William Paley's injunction that the 'chief end of criminal law was not justice, but "the welfare of the community"'.⁸⁶ In line with the 'retributive principle of *lex talionis*' – an eye for an eye – the colonial press gave voice to popular expectations that punishment should 'fit the crime'.⁸⁷ This principle was also shared by those prosecuting criminal offences in the colony. In his opening address to the court in May 1824, Attorney-General Gellibrand summed up the conventional stance, quoting from Lord Chief Justice Hale's influential seventeenth-century rules for dispensing justice:

If in criminals it be a measuring cast, to incline to mercy and acquittal.

In criminals that consist merely in words, when no more harm ensues, moderation is justice.

In criminals of blood, if the fact be evident, severity is justice.⁸⁸

By the 1830s, however, public opinion was shifting, and the reformist colonial press openly questioned the humanity and utility of capital punishment. Subverting the Old Testament idiom of earlier execution narratives, the anti-government *Tasmanian and Austral-Asiatic Review* condemned the 1835 hanging of four men for a burglary without violence with the rhetorical question, 'Who will deny that these men are fresh victims to that all devouring and devastating MOLOCH!'⁸⁹ In 1837, pressmen in Hobart Town and Launceston expressed both horror and frustration when

⁸⁶ Gatrell, *The Hanging Tree*, p. 518; W. Paley, *Principles of Moral and Political Philosophy*, Vol. II. *The Seventh Edition, Corrected* (London, Printed by J. Davis, 1790), p. 302.

⁸⁷ Miethe and Lu, *Punishment*, pp. 16-17.

⁸⁸ M. Hale, 'Things necessary to be had continually in remembrance' in G. Burnet, *The Life and Death of Sir Matthew Hale, Kt., sometime Lord Chief Justice of His Majesties Court of Kings Bench* (South Hackensack, Rothman Reprints, 1972; originally published London, 1682), pp. 44-45; R. v. Tibbs [1824], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_tibbs/> accessed 23 November 2011.

⁸⁹ *Tasmanian and Austral-Asiatic Review*, 13 February 1835, p. 55. Original capitalisation. Associated in the Old Testament with child sacrifice, the Canaanite god, Moloch, stands for 'a person or thing to which extreme or terrible sacrifices are made'. *OED*.

the body of John Lamb was gibbeted near the scene of a murder, in a 'revival of a disgusting relic' of a 'barbarous age'.⁹⁰ Hanging in chains had been abolished in England in 1834.

Chief Justice Pedder's involvement in the capital felony process did not end when he pronounced sentence of death. Following the island's administrative separation from New South Wales in December 1825, post-sentencing review of capital convictions recorded in the Supreme Court became the responsibility of the newly constituted Executive Council of Van Diemen's Land.⁹¹ On the advice of the chief justice and other members of the Council, Governor Arthur could choose to exercise the prerogative of mercy to pardon prisoners, or commute their sentences. As an *ex officio* member of this local advisory body, Pedder was therefore a key participant in the executive review of his judicial practice.

In 'reports on prisoners capitally convicted', Pedder alerted the governor and fellow Councillors to relevant factors in each case, and actively participated in Council deliberations on these reports.⁹² Most cases involved non-murder offences, and the Council often met over several days to consider multiple reports, following the 'judgement days' at the end of Sessions of Oyer and Terminer, when prisoners were sentenced en masse. On 1 January 1826, for example, Pedder reported on 25 prisoners convicted in the most recent sessions; in September, at meetings held over four days, the fate of 37 condemned men was reviewed on the basis of his reports.⁹³ The Council

⁹⁰ *Hobart Town Courier*, 19 May 1837, p. 2, which includes reprinted commentary from the *Launceston Advertiser*; Davis, *The Tasmanian Gallows*, p. 35. Having been hanged in Hobart Town, Lamb's body was taken to the Northern Midlands town of Perth, where it was 'arranged in the usual iron casing'. The gibbet was '20 feet high' and located 'about 450 yards from the main road', as 'near to the spot at which he committed the murder, as possible'. See *R. v. McKay and Lamb* [1837], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1837/r_v_mckay_and_lamb/> accessed 1 January 2012.

⁹¹ *Hobart Town Gazette*, 3 December 1825, p. 1.

⁹² See Chief Justice's Reports on Prisoners Capitally Convicted, AOT MM71/1/7-10 Tasmanian Archival Estrays in the State Library of New South Wales: Dixon Collection. Governor's Office – Chief Justice Reports, 1823-1839, reels Z3234-3237.

⁹³ Minutes of Proceedings of the Executive Council, 1 January 1826, and 7, 8, 9, and

also met on an ad hoc basis to discuss particular murder convictions. Often meeting with some urgency, Councillors usually reviewed murder cases on a Saturday, as executions ordered on a Friday were scheduled for the following Monday in accordance with provisions of the *Murder Act*.

In cases where common or statute law allowed flexibility in punishment, a brief survey of the factors considered by the Executive Council indicates that pardoning decisions were influenced by community attitudes towards crime and to the types of offender considered worthy of mercy. Peter King's quantitative analysis of Home Office pardoning policies in the late eighteenth century illustrates that punishment was thereby 'individualised during the pardoning process'.⁹⁴ King identifies a variety of positive and negative factors which influenced post-sentencing review. While it is difficult to assess the relative impact of each factor, his 'factor mentions system' nonetheless offers a useful, if somewhat 'crude map of the pardoning terrain'.⁹⁵ Demographic distortion in the penal colony of Van Diemen's Land notwithstanding, most of the factors in pardoning mentioned during Executive Council deliberations bear a close correlation to those recorded in the Home Office records examined by King.⁹⁶ King's work therefore provides a valuable contextual frame for reading the language of pardoning in Executive Council reviews in Van Diemen's Land.

Following King, pardoning factors may be divided into five broad categories: legal technicalities; doubts relating to the prosecution; crime-centred variables; variables associated with the individual offender; and 'other' factors. Legal technicalities included doubts around whether the crime was

11 September 1826, AOT EC4/1/1, ff. 14-15, 78-80, reel Z1474.

⁹⁴ King, *Crime, Justice and Discretion*, p. 314.

⁹⁵ King, *Crime, Justice and Discretion*, pp. 298-301; and cf. Hay on the difficulty of teasing out the relative influence of each factor using King's quantitative approach. Hay, 'Writing about the death penalty', pp. 42-43.

⁹⁶ Differences reflect the gender imbalance of the colony, and the fact that convicts sentenced by the Supreme Court for secondary offences committed in Van Diemen's Land did not usually have families or employment to return to – factors which positively influenced pardoning decisions in England. King, *Crime, Justice and Discretion*, p. 299.

strictly within the letter of the law, or whether the jury had been legally constituted. In 1827, for example, James Rutherford and Andrew Peebles were pardoned for robbery because 'the facts proved of the Crime' of which they had been convicted 'barely in Law amount to a Robbery'.⁹⁷ Executive Councillors noted that there 'appears to have been no serious intention of committing a Robbery, as the Person robbed and the Prisoners were all friends and had been drinking together'.⁹⁸ When the Council reviewed the case of burglar, John Robinson, in July 1831, Pedder advised that 'one of the [military] officers who had lately sat on the Jury had not had his name previously inserted in the Lieutenant Governor's precepts, and the Attorney General entertained some doubts of the legality of the proceedings in the particular trials upon which this officer had been a Juryman'.⁹⁹ As a result, consideration of the case was deferred. When the case was reviewed again in December, the governor was 'advised to spare this man's life upon the recommendation of the Chief Justice' because of this irregularity.¹⁰⁰

Uncertainty about the guilt of an individual prisoner was also ventilated where, for example, doubts were raised about the prosecutor's character or evidence, or where a person was charged as one of a group of offenders. In 1826, Charles Bradshaw's sentence of death for robbery was commuted to transportation for life because the Council found 'reason to doubt the truth of the Prosecutor's testimony as it appears he had been drinking just before the Robbery was committed'.¹⁰¹ In 1831, the lives of five convicts who absconded from Port Arthur and stole a cow were spared when the Council advised that it 'would be difficult to say which of the men was most guilty'.¹⁰²

⁹⁷ Minutes of Proceedings of the Executive Council, 26 and 27 June 1827, EC4/1/1, f. 187, reel Z1474.

⁹⁸ Minutes of Proceedings of the Executive Council, 26 and 27 June 1827, EC4/1/1, f. 187, reel Z1474.

⁹⁹ Minutes of Proceedings of the Executive Council, 29 and 30 July 1831, EC4/1/2, f. 116, reel Z1474.

¹⁰⁰ Minutes of Proceedings of the Executive Council, 12 December 1831, EC4/1/2, f. 206, reel Z1474.

¹⁰¹ Minutes of Proceedings of the Executive Council, 26 and 27 June 1827, EC4/1/1, ff. 183, 186, reel Z1474.

¹⁰² Minutes of Proceedings of the Executive Council, 12 December 1831, EC4/1/2, f. 204,

Crime-centred factors addressed the prevalence and seriousness of an offence, and consequent perceptions around the need for exemplary justice. In September 1826, the Executive Council reviewed the case of four transportees convicted of 'Robbery from the person of a prisoner in the Prisoners Barracks termed by the Convicts "Blanketting"'.¹⁰³ Councillors agreed that 'as these Men are the first convicted of the offence for which they are now sentenced to Death ... Mercy might be shewn to them'.¹⁰⁴ Their original sentence of death was commuted to transportation for the life. In June 1827, John Lane and William Harry, convicted of 'stealing a cow', were similarly reprieved 'because the Council is of opinion that the Crime of cattle stealing, being less frequent on this side of the Island than sheep stealing, there is not so great [a] necessity for inflicting the extreme punishment of the Law for this offence'.¹⁰⁵

Pardoning factors which focussed on the circumstances of the individual offender included age, sex, previous good character, previous convictions, civil status (convict or free),¹⁰⁶ and whether the crime involved premeditation, violence, aggravating circumstances, or intoxication. King's analysis highlights the categorisation of individual offenders according to prevailing notions of who did (or did not) deserve mercy: young offenders, women, and people of previously good character attracted greater sympathy and leniency than older, male recidivists.¹⁰⁷ In their analysis of trials heard at the Old Bailey during a comparable period, Hitchcock and Shoemaker also demonstrate that youth, sex and character were often more influential

reel Z1474.

¹⁰³ Minutes of Proceedings of the Executive Council, 7, 8, 9, 11 September 1826, EC4/1/1, f. 80, reel Z1474. The offence was so named because a blanket was put over the prisoner's head while he was robbed. Davis, *The Tasmanian Gallows*, p. 28.

¹⁰⁴ Minutes of Proceedings of the Executive Council, 7, 8, 9, 11 September 1826, EC4/1/1, f. 80, reel Z1474.

¹⁰⁵ Minutes of Proceedings of the Executive Council, 26 and 27 June 1827, EC4/1/1, f. 185, reel Z1474.

¹⁰⁶ Some offences, such as absconding from a penal settlement, were status offences which related specifically to the person's status as a convict.

¹⁰⁷ King, *Crime, Justice and Discretion*, p. 327.

factors in pardoning than the evidence presented at trial.¹⁰⁸ Similarly, in his study of the 'bloody code' in England and Wales, Gatrell identifies character as the 'key variable in sentencing'.¹⁰⁹

The minutes of Executive Council meetings also point to the influence of ungrouped 'other' factors. As in England, petitions for clemency received from the prosecutor, and/or others affected by the offence, were considered as part of the review process. In 1831, petitions in favour of locally convicted forger, George Woodward, were received 'from 193 persons principally connected with commerce, urging their desire to have the punishment of death for forgery abolished'.¹¹⁰ In the Supreme Court, Woodward had initially pleaded guilty to 'forging and uttering a promissory note for £100' before the 'humane intervention' of Chief Justice Pedder induced him to 'retract his plea and take his trial'.¹¹¹ Having freely admitted his crime, however, Woodward was found guilty by the jury and received the mandatory sentence of death.¹¹²

Woodward was not a transported convict, but a respectable surveyor with a young family,¹¹³ and his personal circumstances attracted 'extensive commiseration [*sic*]'.¹¹⁴ His case also attracted particular attention from the colonial press because of the anticipated reform of statute law by the imperial parliament. Reporting Woodward's reprieve in December 1831, the *Colonial Times* delighted that 'no more blood will be offered up in this Colony, as a sacrifice to the folly of our ancestors, in having constituted forgery a capital offence', when so many other crimes 'of a graver die' remained

¹⁰⁸ Hitchcock and Shoemaker, *Tales from the Hanging Court*, p. 166.

¹⁰⁹ Gatrell, *The Hanging Tree*, p. 540.

¹¹⁰ Minutes of Proceedings of the Executive Council, 12 December 1831, EC4/1/2, ff. 204-205, reel Z1474.

¹¹¹ *Australian*, 2 September 1831, p. 4.

¹¹² *Colonial Times*, 27 July 1831, p. 4; *Hobart Town Courier*, 3 December 1831, pp. 2-3.

¹¹³ His 'Affecting Case of Forgery' was reported in the *Australian*, 2 September 1831, p. 4, reprinted from the *Colonial Times*, 27 July 1831, pp. 3-4. Woodward was formerly employed in Van Diemen's Land as an Assistant Surveyor. In his defence, Woodward referred to his 'innocent wife' and 'infant' child.

¹¹⁴ *Colonial Times*, 28 December 1831, p. 2.

‘punishable in a manner that scarcely deserves the name of punishment’.¹¹⁵ In a ‘triumph of enlightened opinions over barbarity and folly’, the *Colonial Times* editorialised, Woodward’s life had been spared by an Executive Council which

recognized [*sic*] a principle that was most ably maintained in a memorial [petition]... presented on his behalf, by a very numerous and respectable body of the inhabitants both of this town and Launceston, of yielding to the unquestionable spirit that is prevalent among the enlightened part of the Mother Country, in opposition to making forgery a capital offence.¹¹⁶

The minutes of meeting reveal that Pedder and his fellow Councillors were indeed influenced by the supplication of the 193 petitioners. They were also swayed by the particular circumstances of the offence, noting their belief in the ‘statement of [Woodward’s] prosecutor that he had been induced to commit the first Forgery under the expectation of receiving from the Cape of Good Hope the means of retrieving the Bill before it became due’.¹¹⁷ Woodward’s life was spared ‘on condition of transportation for life’.¹¹⁸

While it is beyond the scope of the present study, a detailed comparative analysis of pardoning factors in Van Diemen’s Land would add a valuable dimension to understanding how the criminal law operated in a penal colony, where the majority of offenders were young male convicts whose very presence on the island was frequently the result of successful appeals for mercy in Britain.

5.2 ‘If ever there was a hanging Judge, that Judge was John Lewis [*sic*] Pedder’

Pedder’s construction as a ‘hanging judge’ draws on a long tradition of English radical satire, in which judges were cast in the ‘time-honoured role’

¹¹⁵ *Colonial Times*, 28 December 1831, p. 2.

¹¹⁶ *Colonial Times*, 28 December 1831, p. 2.

¹¹⁷ Minutes of Proceedings of the Executive Council, 12 December 1831, EC4/1/2, ff. 204-205, reel Z1474.

¹¹⁸ Minutes of Proceedings of the Executive Council, 12 December 1831, EC4/1/2, ff. 204-205, reel Z1474.

of 'bloodthirsty enemies of the poor'.¹¹⁹ Like Judge Jeffreys at the 'Bloody Assizes', Pedder has been absorbed into an ideologically inspired popular tradition of 'hanging judges' in revolutionary times or frontier locales. Similar constructions have been applied to Lord Norbury, Chief Justice of the Irish Common Pleas from 1800 to 1827,¹²⁰ and Isaac C. Parker, a U.S. District Court Judge between 1875 and 1896.¹²¹ The mythologised career of Pedder's near contemporary, Sir Matthew Baillie Begbie (1819-1894), provides some specific parallels.

A generation younger than Pedder, Begbie was also a Chancery barrister appointed to establish judicial apparatus in a frontier society in the remote colony of British Columbia. Like Pedder, he sat on the Executive Council and maintained a close relationship with the governor; during his lifetime, he also enjoyed a reputation for judicial fairness.¹²² Begbie's biographer, David Ricardo Williams, disputes his posthumous reputation as a hanging judge, citing the 'stern' criminal law of the age and Begbie's extra-curial efforts to obtain reprieves for the many Indigenous people he had sentenced to death.¹²³ Williams attributes Begbie's own 'sternness' on the bench to 'an act of policy adopted to impress all sections of the community'.¹²⁴ Differentiating the demands of judicial duty from personal inclination, Begbie's sentencing practices were, Williams argues, unrepresentative of his 'real nature, which was essentially humane and compassionate'.¹²⁵

¹¹⁹ Gatrell, *The Hanging Tree*, p. 504.

¹²⁰ R. Keane, 'Toler, John, first earl of Norbury (1745-1831)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 <<http://www.oxforddnb.com/view/article/27498>> accessed 28 June 2011.

¹²¹ R.H. Tuller, *'Let No Guilty Man Escape': A Judicial Biography of 'Hanging Judge' Isaac C. Parker*. Legal History of North America 9 (Norman, University of Oklahoma Press, 2001), pp. 5-8.

¹²² D.R. Williams, 'Begbie, Sir Matthew Baillie', *Dictionary of Canadian Biography Online*, <http://www.biographi.ca/009004-119.01-e.php?id_nbr=5958&interval=25&PHPSESSID=op9sh42rf7qc2sehgvavue8ba5> accessed 27 January 2011.

¹²³ Williams, 'Begbie, Sir Matthew Baillie', *Dictionary of Canadian Biography Online*.

¹²⁴ Williams, 'Begbie, Sir Matthew Baillie', *Dictionary of Canadian Biography Online*.

¹²⁵ Williams, 'Begbie, Sir Matthew Baillie', *Dictionary of Canadian Biography Online*.

Writing for the Hobart *Mercury* in 1873, retired Surveyor-General, James Erskine Calder, was the first local commentator to apply the 'hanging judge' trope to Pedder. Employed by the Survey Department from 1829 to 1870, Calder was a contemporary of Pedder in the colonial government, but had not been a supporter of the Arthur administration.¹²⁶ In retirement, he became a 'prolific writer' and published a series of sketches and opinions about the 'old days', under the heading 'Tasmanian History'.¹²⁷ Michael Roe usefully problematises Calder's 'reminiscences', pointing to the amorphous line between 'witness-evidence' and 'history'.¹²⁸ Calder was certainly present in Hobart Town during part of the period he describes, and might have witnessed many hangings, but he wrote at a distance of nearly twenty years after Pedder's retirement, and almost forty years after the 'heyday of capital punishment'.

Familiarity with the literary tradition of the 'hanging judge' is implicit in Calder's essays. Portraying the chief justice as 'ill-tempered ... sometimes unnecessarily harsh, and never over merciful to the unfortunate creatures ... he tried', Calder asserts that Pedder was a 'Judge who had probably passed more death sentences than any other colonial Judge living'.¹²⁹ This assessment is strikingly similar to popular commentary on English circuit judge, Sir Robert Graham.¹³⁰ In *The Bench and the Bar* (1837), London newspaper editor, James Grant, provides a comparatively light-hearted sketch of Graham: like Pedder, he 'was upwards of thirty years a judge ... and capital punishments were then the order of the day'.¹³¹ Completing the

¹²⁶ Calder was allied with Arthur's successor, Sir John Franklin.

¹²⁷ J.B. Thwaites, 'Calder, James Erskine (1808-1882)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010179b.htm>> accessed 27 January 2011.

¹²⁸ Roe, *An Imperial Disaster*, pp. 239, 251.

¹²⁹ *Mercury*, 19 August 1873, p. 3. A judge's 'bad temper' was also part of the trope. See, Gatrell, *The Hanging Tree*, p. 506, 508-509, who reiterates it uncritically.

¹³⁰ In his long career, Graham passed 'innumerable death sentences'. P. Polden, 'Graham, Sir Robert (1744-1836)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008, <<http://www.oxforddnb.com/view/article/11221>> accessed 13 February 2011.

¹³¹ J. Grant, *The Bench and the Bar, by the Author of 'Random Recollections of the Lords and Commons' and 'The Great Metropolis', &c., &c., in Two Volumes. Vol. I* (London, Henry Colburn,

parallel, Graham was reputed to have ‘sentenced more unfortunate human beings to death than any other judge who ever presided at a county assizes’.¹³²

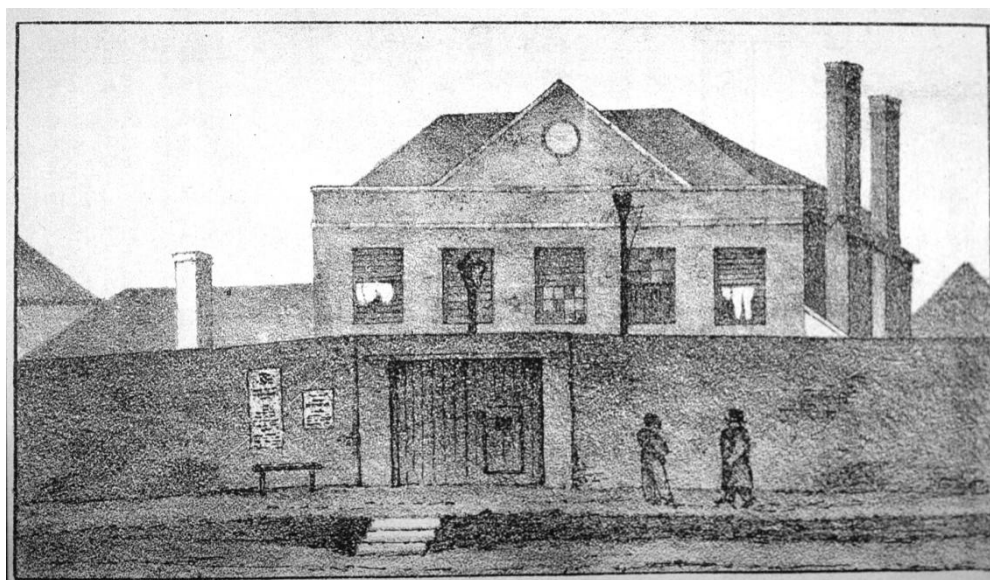


Figure 14: ‘His Majesty’s Jail, Hobart Town’, with the gallows visible above the perimeter wall.¹³³
Image reproduced courtesy of the W L Crowther Library, Tasmanian Archive and Heritage Office

To underscore his more serious claim about the Chief Justice of Van Diemen’s Land, Calder explains that Pedder ordered offenders to be hanged ‘literally by dozens’.¹³⁴ Hanging prisoners en masse was a regular feature of colonial justice in the 1820s, and Calder correctly states that the ‘scaffold seldom sufficed’ for the executions ordered on a ‘judgement day’ at the end of a criminal sittings.¹³⁵ As illustrated in Table 3, below, Calder’s claim that the condemned men were usually ‘disposed of in instalments of six or eight at a time’ is supported by a summary of executions published in the *Colonial Times* under the heading of ‘Executions. List of prisoners tried, found guilty, and executed, at Hobart Town, Van Diemen’s Land, from the 1st of January

1837), p. 76.

¹³² By coincidence, Graham was also an ‘inveterate’ snuff-taker. Grant, *The Bench and the Bar*, pp. 76, 78; Gatrell, *The Hanging Tree*, p. 503.

¹³³ The lithograph appeared in the *Hobart Town Magazine* Vol. II, No. 12 (H. Melville, Hobart Town, February 1834), W L Crowther Library, TAHO, <<http://catalogue.statelibrary.tas.gov.au/item/?id=655154>> accessed 14 January 2011.

¹³⁴ *Mercury*, 19 August 1873, p. 3.

¹³⁵ *Mercury*, 19 August 1873, p. 3.

1823, to the 1st of January 1827'.¹³⁶ The number of men hanged in groups ranges from three, executed for murder on a single day in January 1825, to nine, hanged for non-murder offences on 18 September 1826.

Date	Total executed	Murder offences	Non-murder offences
22 July 1824	5	0	5
28 January 1825	3	3	0
25 February 1825	8	3	5
26 February 1825	4	0	4
31 August 1825	5	2	0
6 January 1826	8	0	8
7 January 1826	6	0	6
4 May 1826	5	5	0
5 May 1826	6	6	0
13 September 1826	7	5	2
15 September 1826	7	0	7
18 September 1826	9	0	9

Table 3: Mass executions at Hobart Town Gaol, July 1824 to September 1826.

With its New Year summary in 1827, the *Colonial Times* reported that, since the opening of the Supreme Court in 1824, 'seventy-six ! have suffered ; most of whom for murder ; and other very daring offences'; a further thirty 'unfortunate men' had 'forfeited their lives' in the northern town of Launceston.¹³⁷ This calculation does not appear to have been intended as criticism of Pedder, however, but as context for the recent 'judgement day' reported on the same page. 'On Saturday last', readers were informed, twelve men were sentenced to be executed: 'six on Monday, and six on Tuesday next'.¹³⁸

Bennett usefully traces the myth of Pedder's 'infirmity of temper' to the 'columns of early hostile journalists' who engaged in 'polemics against

¹³⁶ *Mercury*, 19 August 1873, p. 3; *Colonial Times*, 5 January 1827, p. 4. Several of the offenders executed for murder had also been convicted of non-murder charges.

¹³⁷ *Colonial Times*, 5 January 1827, p. 4. Original emphasis.

¹³⁸ *Colonial Times*, 5 January 1827, p. 4. Two others were sentenced to death but respited; twelve others were sentenced to seven years' transportation.

authority', often in defence of libel proceedings against themselves.¹³⁹ He reads Calder's 'obsessive criticisms' of Pedder as an embellishment of this local tradition.¹⁴⁰ Another of Pedder's contemporaries offers a more sympathetic perspective, which supports Bennett's interpretation. In a letter to the editor of the *Mercury*, former Clerk of the Executive Council, J.W. Kirwan, directly challenged the implications of Calder's claim that Pedder had 'passed more death sentences than any "living Judge"'.¹⁴¹ Given Pedder's long judicial tenure, Kirwan did not dispute the fact that he had sentenced many offenders to death. Instead, he asked, 'Was this the fault of the Judge?'¹⁴²

In contrast to Calder's personal hostility towards Pedder, Kirwan was an old friend who sought to 'vindicate' the 'memory of one of the most upright and humane Judges that ever presided on the Bench in Her Majesty's dominions'.¹⁴³ In his view, the judge was 'simply the living mouth-piece of the law', and if, 'like Draco's' it had been 'written in letters of blood', it was not by Pedder, but the imperial parliament.¹⁴⁴ Indeed, though highly critical of Kirwan's rebuke of Calder, the *Mercury's* editor conceded that the gallows regime was the 'fault of the law and the times' and the 'misfortune of the Judge'.¹⁴⁵

Sensationalist narratives in the 'hanging judge' tradition retained their popularity in to the twentieth century. During the First World War, a Melbourne tabloid serialised, and then published in book form, *The History of Tasmania written specially for "Truth"*.¹⁴⁶ 'The object of this "History of

¹³⁹ In addition to his newspaper criticism, Calder's unpublished papers record that he had witnessed a tendency to 'peevishness', which earned him the 'sobriquet of Sir Petulant Pedder'. Bennett, *Sir John Pedder*, p. 64; Ely, *Carrel Inglis Clark*, p. 16, n. 34.

¹⁴⁰ Bennett, *Sir John Pedder*, pp. 63-64.

¹⁴¹ *Mercury*, 27 August 1873, p. 3; Bennett, *Sir John Pedder*, p. 65.

¹⁴² *Mercury*, 27 August 1873, p. 3.

¹⁴³ *Mercury*, 27 August 1873, p. 3.

¹⁴⁴ *Mercury*, 27 August 1873, p. 3.

¹⁴⁵ *Mercury*, 27 August 1873, p. 3.

¹⁴⁶ 'Preface', *The History of Tasmania written specially for "Truth"*, [n.p.]. *Truth* had a national circulation and various state editions.

Tasmania”, the anonymous author avers, ‘is to tell in a plain way the true story of the bad old days in Van Diemen’s Land. Though some of the facts set forth may seem almost too startling for belief, readers are assured that they are strictly accurate’.¹⁴⁷ Some of these ‘startling’ facts concern Chief Justice Pedder. Like Tutchin’s sensational account of the ‘Bloody Assizes’, the significance of *The History of Tasmania* lies less in its historical inaccuracies than its capacity to rework the ‘hanging judge’ trope for a new audience.

In a series of hyperbolic sketches, *The History of Tasmania* depicts Pedder as the ‘embodiment of judicial murder and devilish heartlessness’; in a land which ‘ran with ... blood’, he ‘fed on the hanging of men’.¹⁴⁸ Reiterating its prefacing claim that the ‘whole work’ is a ‘reliable record’ based on ‘authentic official records in public and private archives’, *The History of Tasmania* reassures readers that “This estimate of the man is not made without a due sense of responsibility for the statement, nor shall it appear without the production of ... the proofs from which the premises are drawn’.¹⁴⁹ The ‘proofs’, however, are flimsy. Archival evidence is used selectively, and supporting examples do not bear out the author’s claims. *The History of Tasmania* repeatedly conflates the workings of the convict management system and the criminal code, and the summary justice of the magistrates bench is little differentiated from the statutory regime of the superior court. Antipathy towards the brutalities of convictism, corporal punishment and public execution are underlying themes.

In the monstrous and arbitrary regime conjured by *The History of Tasmania*, Chief Justice Pedder actively collaborated with Governor Arthur to ‘increase the streams of blood that cried aloud with a thousand outraged tongues to high heaven ... for cessation’.¹⁵⁰ The text features many ‘sensational stories

¹⁴⁷ ‘Preface’, *The History of Tasmania written specially for ‘Truth’*, [n.p.].

¹⁴⁸ *The History of Tasmania written specially for ‘Truth’*, pp. 105-107.

¹⁴⁹ *The History of Tasmania written specially for ‘Truth’*, p. 106.

¹⁵⁰ *The History of Tasmania written specially for ‘Truth’*, p. 106.

painting convicts as murderers, ruffians and rapists',¹⁵¹ but it also trivialises crimes committed by particular individuals in order to illustrate Pedder's determination to hang every offender who came before his court.¹⁵² 'Gentile or Jew, man or woman', *The History of Tasmania* asserts, 'once before Pedder on a capital offence, [the defendant] was sent swinging out of this world to meet his Maker in the next'.¹⁵³ To demonstrate this point, the cases of a Jewish man and a Scotswoman are introduced; neither is identified as a convict in the text.

The first example concerns Abraham Aaron, distinguished as 'the first Jew to be hanged in Vandemonia'.¹⁵⁴ Contemporary press reports indicate that Aaron, a young man transported for stealing a silver pointer from a London synagogue, had 'pleaded guilty to stealing various articles of clothing from Archibald M'Lachlan [*sic*] at Maria Island' in May 1828.¹⁵⁵ In a lean year for court reporting,¹⁵⁶ the *Hobart Town Courier* stated cursorily that Aaron was 'sentenced to be hanged' and 'suffered the sentence of the law' on 1 August 1828.¹⁵⁷

¹⁵¹ Alexander, *Tasmania's Convicts*, p. 218.

¹⁵² *The History of Tasmania written specially for 'Truth'*, p. 106; cf. Oxley on the tendency of scholarly and popular writing about convicts to oscillate between the 'trivial offenders theory' and the 'criminal class thesis'. Oxley, 'Counting the convicts', p. 116.

¹⁵³ *The History of Tasmania written specially for 'Truth'*, p. 106.

¹⁵⁴ *The History of Tasmania written specially for 'Truth'*, p. 106. For a brief biography of Aaron, see J.S. Levi, *These are the Names: Jewish Lives in Australia, 1788-1850* (Melbourne, Melbourne University Publishing, 2006), pp. 1-2.

¹⁵⁵ *Hobart Town Courier*, 19 July, 1828, p. 3. Conduct record, Abraham Aaron, AOT CON31/1/1, f. 48, available online at http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-1,433,52,L,80 accessed 28 January 2011.

¹⁵⁶ Petrow and Kercher note that no law reports were published that year by the *Hobart Town Gazette* or *Colonial Times*; few cases appeared in the *Hobart Town Courier* and *Colonial Advocate*; and the *Tasmanian* recorded only brief summaries of the defendant, charge and verdict. See footnote to R. v. James, Pennel and McGuire [1828], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1828/r_v_james_pennel_and_mcguire/ accessed 23 November 2011.

¹⁵⁷ *Hobart Town Courier*, 19 July, 1828, p. 3; 2 August 1828, p. 2.

Supreme Court records confirm that Aaron pleaded guilty to the capital offence of burglary.¹⁵⁸ *The History of Tasmania* decries the severity of Aaron's execution 'for robbing his master', asserting that his offence was 'a crime that nowadays [1915] might have secured him 18 months' imprisonment softened with remissions for good behaviour'.¹⁵⁹ This anachronistic comparison implies that Pedder punished Aaron with unusual harshness. In fact, recent imperial legislation gave the trial judge no discretion in sentencing. Sentencing several prisoners for burglary the following year, Pedder explained the mandatory sentence of death:

Your offence was always, and still is, an offence at common law, and by certain acts passed for that purpose, it has long been subject to the penalty of death. [...] by that act of Mr Peel's which was in fo[r]ce when you were tried, it is enacted that persons conv[i]cted of burglary shall suffer death. Of that offence you have so been convicted. The sentence of death therefore is that which I must pass upon you.¹⁶⁰

As clarified by Pedder's address, it was the criminal code, not the caprice of the judge or the colonial administration that condemned Abraham Aaron to death. He had pleaded guilty to a capital charge; the jury had no alternative but to convict; and the trial judge was required by law to impose the death penalty.¹⁶¹

Suggesting that Aaron's fate did not offend contemporary sensibilities in Van Diemen's Land, editorial comment at the time of his execution did not question the appropriateness of the sentence. Instead, Hobart Town pressmen showed greater interest in his recent conversion to Christianity, which provided their audience with an appropriately 'penitent' execution

¹⁵⁸ Register of prisoners tried in criminal cases, AOT SC41/1/3, ff. 43-43a, case no. 182, reel Z733.

¹⁵⁹ *The History of Tasmania written specially for 'Truth'*, p. 106.

¹⁶⁰ *Hobart Town Courier*, 31 October 1829, p. 1; R. v. Madden and others [1829], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1829/r_v_madden_and_others/> accessed 23 November 2011. The 'act of Mr Peel's' referred to by Pedder was the *Larceny Consolidation Act* (1827). Section 11 provided that 'every person convicted of burglary shall suffer death as a felon'.

¹⁶¹ Aaron's case was reviewed in the Executive Council, but no reprieve was granted. Minutes of Proceedings of the Executive Council, 25 July 1828, EC4/1/1, f. 334, reel Z1474.

narrative.¹⁶² Even the humanitarian editor of the *Tasmanian and Austral-Asiatic Review* reported with approbation that Aaron ‘appeared to meet his fate with resignation. He shortly addressed the spectators, particularly the Jews, and assured them there is no salvation but through the blood of our Lord Jesus Christ’.¹⁶³

In relating the case of Mary McLauchlan, *The History of Tasmania* chooses another ‘first’: this time, the ‘first woman to terminate her existence on the scaffold’.¹⁶⁴ On 15 April 1830, McLauchlan was tried for the ‘wilful murder of her male bastard child’, which had been found dead in a privy at the Female House of Correction soon after birth.¹⁶⁵ McLauchlan had been separated by transportation from her husband and children in Scotland, and sympathetic commentators in Van Diemen’s Land adopted the conventional assumption that she had ‘been driven to commit the crime by a sense of degradation and shame from the fear that the birth of her child would become known to her relatives at home’.¹⁶⁶

Elizabeth Rapaport’s exploration of infanticide in law and myth demonstrates that ‘dominant representations of infanticide in popular media and in

¹⁶² *Hobart Town Courier*, 2 August 1828, p. 2. On penitent execution narratives, see P. King, ‘Newspaper reporting and attitudes to crime and justice in late-eighteenth- and early-nineteenth-century London’, *Continuity and Change* 22 (1) (2007), p. 99. *The History of Tasmania* also records Aaron’s conversion and exhortation from the scaffold, but interprets this as evidence of a man turning ‘renegade on the religion of his forefathers under sentence of death’. *The History of Tasmania written specially for ‘Truth’*, p. 106.

¹⁶³ *Tasmanian and Austral-Asiatic Review*, 2 August 1828, cited at R. v. McLauchlan [1830], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_law/tas/cases/case_index/1830/r_v_mclauchlan/> accessed 23 November 2011; Levi, *These are the Names*, pp. 1-2. Editor, Robert Lathrop Murray, used his newspaper to condemn whipping and, later, the continued use of capital punishment for sheep and cattle stealing in the colony. E.M. Miller, *Pressmen and Governors: Australian Editors and Writers in Early Tasmania* (Sydney, Sydney University Press, 1973), pp. 12, 186.

¹⁶⁴ R. v. McLauchlan [1830].

¹⁶⁵ ‘A Report of Prisoners tried and convicted of Capital Offences and now in His Majesty’s Gaol at Hobart Town’, 16 April 1830, AOT MM 71/1/7, f. 597, reel Z3234; H. MacDonald, *Human Remains: Episodes in Human Dissection* (Melbourne, Melbourne University Press, 2005), p. 72.

¹⁶⁶ MacDonald, *Human Remains*, p. 61; Minutes of Proceedings of the Executive Council, 17 April 1830, AOT EC4/1/1, f. 535, reel Z1474; S. Ayres, ‘Who is to shame? Narratives of neonaticide’, *William and Mary Journal of Women and Law* 14 (1) (2007), pp. 55, 59.

scholarship' cling to the binaries of 'mad woman or desperate girl'.¹⁶⁷ Implicitly diminishing the criminality of her actions, the anonymous author of *The History of Tasmania* constructs McLauchlan as a desperate girl. Her illegitimate child becomes 'a babe, ditch delivered of a drab'.¹⁶⁸ The child, it assumes, was 'born into a world of suffering and vice, and in the unfortunate woman's eyes [was] better out of the way'.¹⁶⁹ By contrast, at the time of her execution, the *Hobart Town Courier* reported the 'popular view' that McLauchlan had killed the child out of 'malice towards the father'.¹⁷⁰

As with Aaron's case, *The History of Tasmania* compares McLauchlan's sentence of death with the penalty for infanticide in 1915. 'Today', it asserts, she 'would receive perhaps a month's imprisonment, or may be, as sometimes happens, she would have been imprisoned till the rising of the Court'.¹⁷¹ In fact, child murder remained a capital offence in 1915, and three women had been hanged in Melbourne as recently as the 1890s, during a 'moral panic' over reproductive crimes.¹⁷² In contrast to the *Truth's* assumptions, however, Mary McLauchlan's execution for the murder of her child was also regarded as severe by the standards of the 1820s. In contemporary English practice, the *Tasmanian and Austral-Asiatic Review* opined, 'even when the dreadful crime of murder is proved, the last extremity of punishment seldom follows'.¹⁷³

In England and the colonies, conviction for child murder was rare in the early

¹⁶⁷ E. Rapaport, 'Mad women and desperate girls: Infanticide and child murder in law and myth', *Fordham Urban Law Journal. Special Feature: Women as Perpetrators of Crime* 33 (2006), p. 258.

¹⁶⁸ The quote comes from *Macbeth*, in which the 'Finger of a birth-strangled babe/Ditch delivered by a drab' (4.1.30-31) is among the ingredients added to the witches' cauldron. S. Ganguly, 'The "Black and Midnight Hags": the Weird Sisters of *Macbeth*' in A. Sen (ed.), William Shakespeare, *Macbeth: With an Introduction, Annotation and Critical Essays. Longman Study Edition* (Delhi, Dorling Kindersley, 2009), p. 254.

¹⁶⁹ *The History of Tasmania written specially for 'Truth'*, p. 106.

¹⁷⁰ *Hobart Town Courier*, 24 April 1830, p. 3; MacDonald, *Human Remains*, p. 79.

¹⁷¹ *The History of Tasmania written specially for 'Truth'*, p. 106.

¹⁷² K. Laster, 'Arbitrary chivalry: Women and capital punishment in Victoria, 1842-1967' in D. Phillips and S. Davies (eds.), *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (Melbourne, Melbourne University Press, 1994), pp. 171-176.

¹⁷³ R. v. McLauchlan [1830].

nineteenth century. Post-mortem evidence was problematic, and doctors were often unable to determine whether a child had been born alive.¹⁷⁴ At the same time, an increasingly 'pathological view of maternal infanticide' and sympathy for the mother meant that juries were reluctant to convict on the capital charge of murder.¹⁷⁵ More usually, a defendant was acquitted, or the charge was reduced by the jury to the non-capital offences of manslaughter or concealment of birth.¹⁷⁶ The repeal of Jacobean infanticide legislation in 1803 meant that 'all cases of newborn child killing' by single women were thereafter treated as common-law murder, in which murder was no longer presumed, but had to be proved.¹⁷⁷ In 1828, the *Offences against the Person Act* extended the offence to married women, and it was 'in compliance with [this] late Act of Mr Peel's' that Mary McLauchlan was sentenced to be hanged.¹⁷⁸

Kathy Laster's reading that the capital punishment of women affronted the 'arbitrary chivalry' of attitudes towards female offenders is echoed in contemporary reaction to McLauchlan's sentence of death.¹⁷⁹ As the *Tasmanian and Austral-Asiatic Review* declared following McLauchlan's execution, 'There is something more than ordinarily dreadful in ... putting a woman to death at any time'.¹⁸⁰ Even members of the Executive Council, who had reviewed the case, sought to 'avert the distressing necessity' of publicly hanging a woman for a crime that 'was not of frequent occurrence'.¹⁸¹ Chief

¹⁷⁴ See, for example, the medical evidence adduced in *R. v. Masters* [1835], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/r_v_masters/> accessed 23 November 2011.

¹⁷⁵ Rapaport, 'Mad women and desperate girls', p. 554.

¹⁷⁶ Under the *Offences against the Person Act* (1828), manslaughter and concealment of birth could be punished with terms of imprisonment.

¹⁷⁷ Ayres, 'Who is to shame?', p. 59. The repeal of 21 Jac. I, c. 27, *An Act to prevent the destroying and murdering of Bastard Children* (1642), removed the presumption of murder, which had been 'difficult and inconvenient to be put in practice'. See 43 Geo. III, c. 53 (*Lord Ellenborough's Act*), s. 3.

¹⁷⁸ Ayres, 'Who is to shame?', p. 59; *R. v. McLauchlan* [1830].

¹⁷⁹ Laster identifies an 'informal system of chivalry', ostensibly deployed to protect women offenders 'from the full rigour of the law'. Laster, 'Arbitrary chivalry', p. 167.

¹⁸⁰ *R. v. McLauchlan* [1830].

¹⁸¹ Minutes of Proceedings of the Executive Council, 16 April 1830, AOT EC4/1/1, f. 534,

Justice Pedder, however, could find no legal objection to the jury's finding that McLauchlan had murdered the child, and therefore informed the Council that he 'could not advise the Lieutenant-Governor to interfere with the course of the law'.¹⁸² At a second Council meeting to discuss the case, Pedder reiterated his advice that there were no grounds for extending mercy to the prisoner.¹⁸³

In her nuanced account of McLauchlan's case, Helen MacDonald implies that Pedder ought to have advised Governor Arthur to 'interfere with the course of the law', as he had in other cases.¹⁸⁴ More significantly for testing Pedder's construction as a hanging judge, however, MacDonald points to the crucial role of his friend and colleague, Joseph Hone, who 'shows up everywhere in this case' – as coroner, presiding over the investigation into the child's death; as Master of Supreme Court, responsible for taking depositions from witnesses; and as an emissary of the Executive Council, tasked with attending Mary McLauchlan in Hobart Town Gaol to learn whether she had 'any statement' to make in mitigation of her crime which might allow the governor to respite her sentence of death.¹⁸⁵ In comparison with Hone's pivotal roles in the case, Pedder's involvement appears very limited.

In contrast to the case of the burglar, Abraham Aaron, there was little public appetite for the execution of a 'wretched woman' like Mary McLauchlan, in spite of her 'dreadful crime'.¹⁸⁶ Even the jurymen who convicted McLauchlan

reel Z1474.

¹⁸² Minutes of Proceedings of the Executive Council, 16 April 1830, AOT EC4/1/1, f. 534, reel Z1474. The *Hobart Town Courier* editorialised that the evidence presented at McLauchlan's trial was 'of the most clear and positive nature', but did not report any of it. *Hobart Town Courier*, 17 April 1830, p. 3; 24 April 1830, p. 2.

¹⁸³ Minutes of Proceedings of the Executive Council, 17 April 1830, AOT EC4/1/1, f. 536, reel Z1474.

¹⁸⁴ MacDonald, *Human Remains*, p. 78.

¹⁸⁵ MacDonald, *Human Remains*, pp. 79-80; and 'A dissection in reverse: Mary McLauchlan, Hobart Town, 1830,' *Lilith: A Feminist History Journal* 13 (2004), p. 20; Minutes of Proceedings of the Executive Council, 17 April 1830, AOT EC4/1/1, f. 535, reel Z1474.

¹⁸⁶ *Hobart Town Courier*, 24 April 1830, p. 2; *Tasmanian and Austral-Asiatic Review*, 23 April 1830, cited at R. v. McLauchlan [1830].

wrote to the governor 'recommending her to mercy'.¹⁸⁷ Reporting McLauchlan's execution, the *Tasmanian and Austral-Asiatic Review* offered its post-hoc view: 'We think we are not offending the stern order of justice, when we venture to consider that it might have been tempered with mercy, without any great violation of the proper performance of that most blessed of human prerogatives'.¹⁸⁸ Emphasising, and empathising with, McLauchlan's 'agony of mind' at giving birth in prison, and her 'additional misery' at being abandoned by the child's father, the *Tasmanian and Austral-Asiatic Review* framed its opposition to her execution on the grounds of 'mercy' and 'policy':

We are ... fully, decidedly satisfied, that example, *the only justifiable ground of punishment*, would have been of infinitely greater effect, had this unhappy creature been confined for ... a long ... period ... in the Factory, clothed in some peculiar garb, by which her offence would have been pointed out to all present and future residents in that miserable abode.¹⁸⁹

Clearly favouring deterrence over retribution in a case of this nature, the editorial also highlights some of the variables which shaped perceptions of offence and offender, and informed public debates around capital punishment.

In the Executive Council itself, Colonial Treasurer, Jocelyn Thomas, had argued unsuccessfully that the imperative of exemplary justice did not require McLauchlan actually to be executed; the horror inspired by her sentence would suffice. Acknowledging contemporary belief that 'example is the great object of the awful punishment of death',¹⁹⁰ Thomas reasoned that it had already been 'fully answered by the great interest and Strong feelings excited in the minds of the inhabitants by the short reprieve already granted'

¹⁸⁷ Minutes of Proceedings of the Executive Council, 17 April 1830, AOT EC4/1/1, f. 535, reel Z1474.

¹⁸⁸ *Tasmanian and Austral-Asiatic Review*, 23 April 1830, cited at R. v. McLauchlan [1830].

¹⁸⁹ *Tasmanian and Austral-Asiatic Review*, 23 April 1830, cited at R. v. McLauchlan [1830]. Original emphasis. The Female House of Correction was known colloquially as the Female Factory.

¹⁹⁰ Minutes of Proceedings of the Executive Council, 17 April 1830, AOT EC4/1/1, f. 535, reel Z1474.

to McLauchlan in the days after sentencing.¹⁹¹ Her subsequent execution could not produce the 'same anxious, deep-felt sentiments of mingled pity and terror which at present pervade all classes', he argued.¹⁹² As the *Tasmanian and Austral-Asiatic Review* editorial and Thomas' argument reveal, the low 'public threshold' for executing female offenders was breached with this first hanging.¹⁹³ No other woman was hanged for reproductive offences during Pedder's tenure in Van Diemen's Land.¹⁹⁴

Significantly, press commentary and the records of the Executive Council illustrate that advocates for mercy focused not on the trial process or the judge, but on the governor, who held the ultimate power to reprieve a condemned prisoner. No contemporary Van Diemen's Land press criticism was directed towards Pedder for his role in McLauchlan's trial and execution. Unlike *The History of Tasmania*, which rebukes the chief justice for sending McLauchlan 'aloft',¹⁹⁵ even the most critical colonial pressman condemned McLauchlan's seducer as the ultimate 'author of her destruction'.¹⁹⁶

For all its spurious claims to authenticity, *The History of Tasmania* is not a history of Tasmania. Rather, its melodramatic narrative of a brutal criminal code in the 'bad old days' appeals to the sensibilities and prejudices of its own age. Its reliance on literary allusions and folk references underscores its

¹⁹¹ Minutes of Proceedings of the Executive Council, 17 April 1830.

¹⁹² Minutes of Proceedings of the Executive Council, 17 April 1830.

¹⁹³ Castle, 'Watching them hang', pp. 43.7-43.8, 43.11; see also King, *Crime, Justice and Discretion*, p. 315, on the 'unseen hand of potential crowd hostility' guiding pardoning decisions.

¹⁹⁴ McLauchlan's friend, Mary Cameron, who had also been 'charged with the murder of her infant child' in April 1830, was discharged by proclamation the day after McLauchlan's execution. Other women charged with child murder were acquitted for lack of evidence, or convicted of the lesser offence of concealing the birth. *Hobart Town Courier*, 24 April 1830, p. 3; MacDonald, *Human Remains*, p. 82; and R. v. King [1842], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/r_v_king/> accessed 23 November 2011.

¹⁹⁵ *The History of Tasmania written specially for 'Truth'*, p. 106.

¹⁹⁶ *Tasmanian and Austral-Asiatic Review*, 23 April 1830, cited at R. v. McLauchlan [1830]. McLauchlan's master, Charles Nairne, was widely believed to be the father, but MacDonald finds only circumstantial evidence to support the claim. MacDonald, *Human Remains*, p. 65.

popular focus.¹⁹⁷ In a recent exploration of the legacy of the convict period in post-transportation Tasmania, Alison Alexander suggests that this 'cheap paperback' from the 'notorious *Truth*' was not 'likely to be taken seriously' by contemporaries, and finds 'no other writer from the period' who mentions it.¹⁹⁸ Nonetheless, its serialised form had a potentially large (albeit unidentified) popular audience, for the *Truth* was 'immensely popular with the working class'.¹⁹⁹

Originally established by 'radical politicians' in the 1880s, *Truth* published a 'weekly journal of sport, crime and exposé articles' to which its new proprietor, John Norton, added 'an even more sensational formula of abuse', targeting figures of British authority.²⁰⁰ Norton's biographer, Michael Cannon, postulates that wide national circulation gave Norton and the *Truth* an 'influence on popular attitudes ... which was more far reaching than has been generally recognized [*sic*]'.²⁰¹ Tracing the reception history of this ephemeral text is problematic.²⁰² Yet, as part of a broader literary phenomenon in which judges are transformed after death into judicial murderers, it is worthy of further investigation.

¹⁹⁷ The text refers, for example, to Macbeth, Lord Tomnoddy (a character in a popular musical comedy), Jack Ketch (the proverbial hangman), and Judge Jeffreys.

¹⁹⁸ Alexander, *Tasmania's Convicts*, p. 218. But cf. Richard Ely identifies *The History of Tasmania* as one of Carrel Inglis Clark's sources for his article in the *Critic*, 21 April 1922; and barrister/legal historian, Bryan Keon-Cohen, cites the text as a secondary source in a scholarly article. Ely, *Carrel Inglis Clark*, p. 17; B. Keon-Cohen, 'Mad Judge Montagu: A misnomer?', *Monash University Law Review* 2 (1975), p. 63.

¹⁹⁹ M. Cannon, 'Norton, John (1858-1916)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University,
<<http://www.adb.online.anu.edu.au/biogs/A110048b.htm>> accessed 21 January 2011.

²⁰⁰ Cannon, 'Norton, John (1858-1916)', *Australian Dictionary of Biography*.

²⁰¹ Cannon, 'Norton, John (1858-1916)', *Australian Dictionary of Biography*.

²⁰² Reception history is conceived as 'the art of reading a text while being conscious of the different ways in which it has been interpreted through history'. As a critical approach, it serves as a reminder that a text has a 'history that begins after it has left the hands of its author'. R. Nicholls, 'Is *Wirkungsgeschichte* (or Reception History) a kind of intellectual *Parkour* (or freerunning)?', Use and Influence of the New Testament Seminar Group at the British New Testament Conference, September 2005,
<<http://www.bbibcomm.net/news/nicholls.pdf>> accessed 8 February 2011; M. Goodacre, 'Drawing from the treasure both new and old: Current trends New Testament studies', *Scripture Bulletin* 27 (2) (July 1997), pp. 66-77, reproduced at
<<http://markgoodacre.org/treasure.htm>> accessed 8 February 2011.

5.3 'His Honor [*sic*] wept': the hanging judge as a man of feeling

In his seminal exploration of the emotional impacts of capital punishment, Vic Gatrell makes no secret of his disdain for the judges who imposed sentence of death. These 'monsters', he asserts, 'confront us with a peculiar and diminished species of being in whom benevolence, sympathy, love and the imaginative faculties were denied'.²⁰³ Gatrell's reductionist assessment is of a piece with the contemporary critics he cites, such as the radical pamphleteer, William Hone – coincidentally, the brother of Pedder's Supreme Court colleague, Joseph. In *The Spirit of Despotism* (1821), Hone proclaimed that, 'Some of the finest faculties of the human constitution, the imagination and sentimental affections' are 'unknown to the judge'.²⁰⁴ Indeed, Hone averred, the chief attributes of a judge were 'a hard head' and a 'cold unfeeling heart'.²⁰⁵ How, then, are we to make sense of a judge like Pedder, who freely wept on the bench, and was praised – and even criticised²⁰⁶ – by contemporaries for his 'humanity'?

Gatrell cautions against contemplating eighteenth- and nineteenth-century judges as if they were 'accessibly modern kinds of people'.²⁰⁷ Instead, he urges, they ought to be approached 'remotely ... as anthropologists might ... not[ing] their peculiar and isolating privileges, the narrowing socializations [*sic*] of their childhood histories and career structures, and above all the peculiar emotional structures which ensued'.²⁰⁸ As illustrated in the chapters of Part I, John Lewes Pedder did inhabit privileged social and professional worlds, within an hierarchical and paternalistic society in which his personal and professional status shielded him from many of life's extremes. He was also exposed to particular brutalities, however. A child of

²⁰³ Gatrell, *The Hanging Tree*, p. 499.

²⁰⁴ [W. Hone], *The Spirit of Despotism: Dedicated to Lord Castlereagh* (London, Printed for William Hone, 1821), p. 77; Gatrell, *The Hanging Tree*, p. 499.

²⁰⁵ [Hone], *The Spirit of Despotism*, p. 77.

²⁰⁶ See, for example, the attorney-general's implicit complaint that prisoners were being spared 'by a Judge and Jury distinguished for humanity'. Gellibrand to Arthur, 4 January 1826, *HRA* III, V, p. 289.

²⁰⁷ Gatrell, *The Hanging Tree*, p. 499.

²⁰⁸ Gatrell, *The Hanging Tree*, p. 499.

the metropolis, Pedder would have been familiar with London's regular 'hanging days',²⁰⁹ and as a trial judge in the criminal jurisdiction of a penal colony, he was routinely confronted with violent crime and a statutory regime that demanded blood. At a professional level, Pedder's equity background had not prepared him for this new role. As Bennett puts it, the former Chancery barrister 'lacked the *sang-froid*, even callousness' of a criminal lawyer.²¹⁰

Contrasting the 'emotionally crippled' judge with the 'bourgeois man of feeling', Gatrell argues that, while some late-eighteenth-century judges might have 'wept fashionably' when sentencing a young woman to death, 'you would not otherwise catch many judges in tears by the 1800s'.²¹¹ In Van Diemen's Land, however, press reports into the 1840s illustrate that Chief Justice Pedder was deeply affected when sentencing prisoners to hang. At the time of his death in 1859, an obituarist recalled that the chief justice was 'often known to shed tears, when ... it devolved upon him to pass the last sentence of the law'.²¹² From the perspective of an old friend, Kirwan's 1873 letter to the *Mercury* provides a more detailed insight into the emotional strain of mandatory sentencing on a judge charged with enforcing it. Refuting Calder's characterisation of Pedder as 'ill-tempered' and 'harsh',²¹³ Kirwan vividly recalled that the 'struggle between duty and the softer and gentler feelings of his heart was visible to all'.²¹⁴ Whenever it was his 'painful duty to pass sentence of death on a fellow creature', Kirwan averred, Pedder's 'whole frame trembled' and he was 'overcome with the humane emotions of his nature'.²¹⁵ At such times, Kirwan suggested, the sensitive

²⁰⁹ Gatrell, *The Hanging Tree*, p. 30. The 'last year of high execution levels in the metropolis', 1822, coincided with Pedder's last full year working as a barrister in London. Devereaux, 'In place of death', p. 58.

²¹⁰ Bennett, *Sir John Pedder*, p. 62.

²¹¹ Gatrell, *The Hanging Tree*, pp. 499, 506-509.

²¹² *Hobart Town Advertiser*, 10 June 1859, p. 3.

²¹³ *Mercury*, 19 August 1873, p. 3.

²¹⁴ *Mercury*, 27 August 1873, p. 3.

²¹⁵ *Mercury*, 27 August 1873, p. 3.

chief justice 'endured more agony than the prisoner in the Dock'.²¹⁶

Kirwan's claims are supported by contemporary press reports of capital cases. In 1827, reporting the conviction of nine men for murdering a constable at the Macquarie Harbour penal station, the *Hobart Town Courier* observed that the chief justice was 'almost overcome by the lamentable and unexampled spectacle of nine human beings convicted of so cold blooded a murder'.²¹⁷ When the jurymen returned a guilty verdict, the *Tasmanian* reported, Pedder explained that 'he felt conscious that the Jury ... had done their duty ... however painful to him was the task which he consequently had to perform'.²¹⁸ The chief justice went on to sentence the nine killers 'in a most feeling and impressive manner, and evidently much agitated'.²¹⁹

Other horrific cases elicited affecting displays of emotion. Sentencing George Pettit to death in 1840, Pedder's 'address was heart-rending – less from the actual words spoken, than the manner and emotion of the speaker, which suffused his eyes with tears, and nearly choked his utterance'.²²⁰ Nineteen-year-old Pettit had murdered his master, Mr Paul, apparently without motive. Highlighting complex contemporary attitudes around the types of offender worthy of sympathy, the *Hobart Town Advertiser* reported:

To have to pass sentence upon one so young, and for such an offence, had (his Honor [*sic*] observed) moved him exceedingly, and it might appear strange that, after passing the same sentence on the two [other] men who had [just] left the dock, his feelings should now be so much excited. But the cases were so different in their complexion, this crime being committed as it were without a

²¹⁶ *Mercury*, 27 August 1873, p. 3.

²¹⁷ *Hobart Town Courier*, 15 December 1827, p. 3.

²¹⁸ *Tasmanian*, 14 December 1827, cited at R. v. Lacey and others [1827], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1827/r_v_lacey_and_others/> accessed 23 November 2011.

²¹⁹ R. v. Lacey and others [1827].

²²⁰ *Hobart Town Advertiser*, 7 February 1840, cited at R. v. Pettit [1840], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1840/r_v_pettit/> accessed 23 November 2011.

motive, and, in the language of the indictment, 'at the instigation of the devil'.²²¹

The *Colonial Times* articulated a similar view of the case. Distinguishing Pedder's judicial duty from his personal inclination, it asserted that, 'Never ... did His Honor [*sic*] ... exhibit so admirably, the abilities, patience, and firmness, of the *Judge* ; or the humanity and kindness of the *Man*'.²²² These qualities were 'most particularly exemplified', it continued,

in sentencing ... the lad Pettit. In our report of that sentence, we have stated that His Honor [*sic*] wept : what man of feeling could refrain from grief to see a human being, in the very outset of life, condemned to die, for a crime the most atrocious ? Sympathy is withheld from the hoary and hardened criminal, but, upon the young and inexperienced it is freely bestowed.²²³

Just as Pedder is seen to be acting in the twin personæ of judge and man, each with its appropriate duties and sentiments, so Pettit is characterised as both pitiable youth and atrocious criminal. In both cases, the personal dimension is subsumed by the public one. Despite its sympathy for the 'boy', the *Colonial Times* was quick to add its support for the punishment imposed by Pedder, declaring that it did not 'in the slightest degree, impugn the sentence, or its probable result'.²²⁴

Still more confronting, sexual offences against children elicited strong emotional responses from the chief justice. '[D]eclaring to his God that he would not have believed such a case to be possible had he not heard the evidence', Pedder sentenced eighteen-year-old Elijah Ainsworth to death in 1842 for assaulting a young child.²²⁵ Horrified by Ainsworth's guilt and mindful of community consensus about the gravity of his offence, Pedder

²²¹ R. v. Pettit [1840]. The two other prisoners, Davis and Riley, had murdered, then robbed, their victim. See *Colonial Times*, 4 February 1840, p. 5.

²²² *Colonial Times*, 11 February 1840, p. 4. Original emphasis.

²²³ *Colonial Times*, 11 February 1840, p. 4.

²²⁴ *Colonial Times*, 11 February 1840, p. 4.

²²⁵ *Launceston Courier*, 11 April 1842, cited at R. v. Ainsworth [1842], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1842/r_v_ainsworth/> accessed 23 November 2011.

‘entreated the prisoner to banish all hope of mercy, as no government in the world dare spare the life of such a monster’.²²⁶ ‘In passing sentence of death’, the *Launceston Courier* narrated, Pedder was ‘greatly agitated and affected’; his ‘voice was frequently broken, and tears were rolling profusely down his cheeks’.²²⁷

Two examples from Pedder’s own correspondence reveal that the responsibility for imposing sentence of death weighed heavily on his mind. The chief justice’s doubts around the legality of two capital convictions in the mid-1820s clearly underscore his concern for procedural fairness. At the same time, Pedder’s language also highlights the emotional dimensions of his work as a trial judge. On 3 February 1825, John Logan faced Pedder in the Supreme Court, charged with ‘Shooting with intent to kill and murder’.²²⁸ Logan was found guilty under *Lord Ellenborough’s Act* of 1803, and sentenced ‘To be hanged’.²²⁹ In April, Pedder was thrown into perplexity by a report from New South Wales, which raised uncertainties about the applicability of *Lord Ellenborough’s Act* to the colonies. In a letter to Arthur, dated 9 April 1825, Pedder ‘very heartily’ thanked the governor for his ‘kindness, in sending me the *Sydney Gazette*, alluding to the decision reported to have been made [by the twelve judges in England] in Davidson’s case’.²³⁰ Explaining the ‘*unhappy situation* in which I find myself placed’,²³¹ Pedder candidly acknowledged gnawing doubts about the legality of Logan’s execution seven weeks earlier.

²²⁶ R. v. Ainsworth [1842].

²²⁷ R. v. Ainsworth [1842]. The attorney-general was ‘also obliged to have recourse to his pocket handkerchief’ as he ‘attempted in vain to subdue his feelings’.

²²⁸ AOT SC45/1/1, case no. 85, ff. 41-42, reel Z225.

²²⁹ 43 Geo. III c. 58; AOT SC45/1/1, case no. 85, ff. 41-42, reel Z225. ‘John Logan, [for] attempting to shoot Mr Shoobridge’, was executed on 25 February. *Colonial Times*, 5 January 1827, p. 4.

²³⁰ Pedder to Arthur, 9 April 1825, Papers of Sir George Arthur (hereafter Arthur Papers), vol. 9, ML ZA 2169, reel MAV/FM4/ 3671. Pedder refers here to the *Sydney Gazette*, 24 March 1825, p. 2. For the original report of Davidson’s conviction and the motion in arrest of judgement, see *Sydney Gazette*, 25 October 1822, p. 2. On the ‘twelve-judge procedure’, see J. Oldham, ‘Informal law-making in England by the Twelve Judges in the late eighteenth and early nineteenth centuries’, *Law and History Review* 29 (1) (2011), pp. 184-191.

²³¹ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169. Editorial emphasis.

At issue was the date of reception of English statute law. Pedder's letter to Arthur canvassed the competing legal opinions.²³² Passed in 1803, *Lord Ellenborough's Act* would not ordinarily have applied in New South Wales and Van Diemen's Land because it had been promulgated after the Act of 1787. Until doubts had been raised by Davidson's case, Pedder explained to Arthur, he had shared the 'unorthodox opinion' of Chief Justice Forbes that the Act did apply in the southern colonies.²³³ In London during the drafting of the *New South Wales Act* of 1823, Pedder recalled, he had 'had more than one conversation with Mr Forbes and Mr John McArthur [*sic*] as to the necessity of adopting Mr Bigge's recommendation' that 'a provision should be made for extending to the Colony all the criminal laws enacted since' the Act of 1787.²³⁴ At that time, Pedder had 'understood Mr Forbes to have been clearly of opinion that such a measure was not necessary', and Pedder himself had 'come out [to Van Diemen's Land] with this general impression on my mind that the act extended hither'.²³⁵

In 1825, however, Pedder told Arthur, 'I must confess to my *everlasting sorrow*, that I have passed sentence in two cases & suffered an execution to take place in one of them under it'.²³⁶ Reiterating his discomfort, Pedder continued, 'It will never cease to be a matter of the *most painful reflection* to me that, upon neither of these occasions, did I look into the Act itself'.²³⁷ After providing a detailed explanation of the legal position and the influence

²³² For the opposing views of the chief justice and attorney-general of New South Wales, See Notes to *R v Smith* [1825] NSWSupC 3, B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Division of Law Macquarie University), <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1825/r_v_smith/> accessed 1 January 2012; A.C. Castles, *An Australian Legal History* (Sydney, Law Book Co., 1982), p. 378.

²³³ Kercher, Notes to *R v Smith* [1825] NSWSupC 3. cf. In New South Wales, attorney-general, Saxe Bannister, took the opposite, 'conventional' position. Doubts had previously been raised by Judge-Advocate Wylde, but the matter was not finally settled until the passage of the *Huskisson Act* in 1828 confirmed the statutory reception date as 25 July 1828.

²³⁴ Pedder explained that Commissioner Bigge's recommendation 'appears to have been made with a particular view to this Act of Ld. Ellenborough'. Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169.

²³⁵ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169.

²³⁶ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169. Editorial emphasis.

²³⁷ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169. Editorial emphasis.

of Forbes and Bigge on his original impression, Pedder conceded that 'strong grounds can perhaps be shewn [*sic*] for contending that the statute does apply hither', but, he confessed, they 'were not the grounds on which I suffered these convictions to take place ... but have subsequently occurred to me'.²³⁸ Taking responsibility for his role in the potentially unlawful execution of Logan, Pedder acknowledged that, 'I cannot with propriety urge [these grounds]' now, because 'any judgment I feel must be influenced in some degree by a strong motive to justify what has taken place'.²³⁹

A second doubtful case had a happier outcome for the prisoner and for Pedder. In 1826, Robert Lathrop Murray, a gentleman who had been transported to Van Diemen's Land for bigamy, was charged with 'forging and uttering a bill of exchange for £50'.²⁴⁰ Murray was found guilty by the jury, but the chief justice doubted whether his actions constituted forgery under the relevant Act. Doubtless with the painful memory of his error in Logan's case firmly in mind, Pedder had indicated to the court that 'in the event of a conviction' he would 'send the case to England' as it raised points that were 'of too great importance to be decided by any one Judge'.²⁴¹

An educated ex-convict turned colonial pressman,²⁴² Murray was a thorn in the side of Arthur's administration and, in Pedder's view, a 'known systematic opposer and calumniator of the government'.²⁴³ Where the 'hanging judge' conjured by Calder and the *Truth* would have relished the

²³⁸ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169.

²³⁹ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169.

²⁴⁰ See R. v. Murray [1826], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1826/r_v_murray/> accessed 1 January 2012, and R. v. Murray and others [1827], <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1827/r_v_murray_and_others/> accessed 1 January 2012.

²⁴¹ R. v. Murray [1826].

²⁴² C.R. Murray, 'Murray, Robert William (1777–1850)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/murray-robert-william-2497/text3367>> accessed 1 January 2012. Referred to in colonial sources as Robert Lathrop Murray, his full name was Robert William Felton Lathrop Murray.

²⁴³ Pedder to Arthur, 11 September 1825, Arthur Papers, vol. 9, ML ZA 2169.

opportunity to rid the government of an enemy like Murray, Chief Justice Pedder pressed his doubts about the conviction, and the case was ultimately referred to 'the twelve Judges'.²⁴⁴ Pedder's relief at their vindication of his concerns is evident in a letter to Arthur, dated 11 April 1829. 'Whether my own particular views of the case were right or wrong', he told the governor, 'it is a *happy circumstance* that I did entertain them, since it has been the means whereby the life of a man has been spared'.²⁴⁵ Suggesting that Pedder's concern for procedural fairness was not just a relic of his equity training, but also reflected a keen awareness that he had to live with his sentencing decisions, the judge barely dared to speculate about the consequences of erring a second time. 'Had Murray been hanged and the opinion of the Crown been ... known', he asked rhetorically, 'what would have been *my feelings*'.²⁴⁶

In contrast, then, to Gatrell's 'emotionally crippled beings', Chief Justice Pedder's affecting displays of emotion on the bench, and the sentiments revealed in his own correspondence, challenge us to humanise a 'hanging judge'. As the chapters of Part I illustrate, Pedder's extra-judicial life offers multiple proofs of his capacity for the 'benevolence, sympathy, love and ... imaginative faculties' which should, in Gatrell's reductionist reading, have no place in the life of a judge. In a sensitive reappraisal of *The Hanging Tree*, Randall McGowen argues that Gatrell too readily identifies with the 'crowd' before the gallows, and too easily condemns the 'cruel' judges.²⁴⁷ This chapter does not condone or condemn Pedder's readiness to impose the 'bloody code'. Rather, it seeks to explain something of the contexts in which he operated and, using his own words where possible, to illuminate his emotional responses to a 'peculiar' professional responsibility.

Historians of capital punishment typically trace the impact of the

²⁴⁴ R. v. Murray and others [1827].

²⁴⁵ Pedder to Arthur, 11 April 1829, Arthur Papers, vol. 9, ML ZA 2169. Editorial emphasis.

²⁴⁶ Pedder to Arthur, 11 April 1829, Arthur Papers, vol. 9, ML ZA 2169.

²⁴⁷ McGowen, 'Revisiting *The Hanging Tree*', pp. 3, 8, 12.

nineteenth-century 'civilising process' on attitudes towards capital punishment.²⁴⁸ In many ways, Chief Justice Pedder embodies the opposing 'cultures within the polite classes' – benevolence and the scaffold.²⁴⁹ Moreover, in the small settler community of Van Diemen's Land, Pedder literally could not distance himself from the consequences of his capital sentencing. The scaffold at Hobart Town Gaol stood directly opposite the courthouse and, for fourteen years, Pedder's official residence in Macquarie Street was within earshot of the gallows. In reconciling himself to his 'painful' professional duty, Pedder appears to have found some solace in the rituals of religion. As the *Hobart Town Advertiser* recorded after his death, it 'has been stated by one who was acquainted with his domestic arrangements, that it was Sir John Pedder's custom specially to remember the unfortunate culprits who were under condemnation, when engaged in family prayers'.²⁵⁰

Conclusions

Charting the capital felony process in Van Diemen's Land during the dying decade of the 'bloody code', this chapter identifies the statutory framework within which Chief Justice Pedder imposed the death penalty. Many actors were involved in the process – from constables and jurors, to Executive Councillors and the press. In contrast to the capricious process conjured in popular (and even scholarly) imagination, the law, penal philosophy and community expectations placed a number of constraints on the exercise of judicial discretion.

A comparative perspective reveals that Pedder's construction as a Tasmanian Judge Jeffreys draws on a long literary tradition which posthumously casts frontier judges, across the Anglophone world, as judicial murders. Its enduring folk resonances are evident in the popular 'histories' of Calder and *The History of Tasmania written specially for 'Truth'*. This tradition is also

²⁴⁸ Gatrell, *The Hanging Tree*, p. ix.

²⁴⁹ Gatrell, *The Hanging Tree*, p. 514.

²⁵⁰ *Hobart Town Advertiser*, 10 June 1859, p. 3.

paralleled in more scholarly treatments of capital punishment in Van Diemen's Land which embody the 'ameliorist' tendency identified by McGowen.

Reported approvingly by the colonial press and Pedder's contemporaries, the chief justice's affecting displays of emotion when sentencing prisoners to death illustrates the conflict between his personal compassion and the requirements of his office. Pedder's own comments also reveal something of the psychological impact of his judicial duty. As chief justice, Pedder indisputably sentenced many individuals to be hanged. However, the trope of the 'hanging judge' diminishes our capacity to make sense of a profoundly different penal philosophy paradigm. Indeed, the evocative archival traces of Pedder's emotional responses are perhaps even more unsettling than the familiarly loathsome stock-character invoked by the name of Judge Jeffreys, because they speak to us in a way that challenges us to experience the reality of capital punishment from the first-hand perspective of one of its reluctant agents.

CHAPTER 6

A PUPPET OF GOVERNMENT?

Throughout the British imperial world, settler-colonists carried with them a 'compelling myth' of constitutionalism and the rule of law, which emphasised the celebrated 'English liberties' guaranteed by Magna Carta, *habeas corpus*, and the Bill of Rights.¹ Other 'constitutional' liberties, such as freedom of the press, remained 'contingent and contested'.² Before the consolidation of trial by jury, freedom of the press, and representative government in the settler-colonial world, the rule of law remained a 'highly tensile notion'.³ Embodying both constitutional and legalistic strands, its rhetoric could be deployed by reformists and conservatives for quite different ends: liberty, order, and even economic stability, through the enforcement of property and contract rights.⁴ In the 'absence of a written constitution', John McLaren explains, the rule of law embodied 'a set of standards ... by which to judge the performance of those possessing governmental and judicial authority'.⁵

Pedder's concurrent roles as head of the judiciary and *ex officio* member of the Executive and Legislative Councils have posed particular challenges for liberal constitutionalist rule-of-law readings of the history of Van Diemen's Land/Tasmania. McLaren's comparative judicial biographies demonstrate that the combination of judicial and political functions in the office of chief

¹ R.L. Fraser, "'All the privileges which Englishmen possess": Order, rights, and constitutionalism in Upper Canada' in R.L. Fraser (ed.), *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography* (Toronto, University of Toronto Press, 1992), p. xxxiii.

² J. McLaren, 'The rule of law in British colonial societies in the 19th century: Gaseous rhetoric or guiding principle?', *The transposition of empire: Historiographic approaches to the translation of juridical and political thought in colonial contexts*, Monash Centre, Prato, 2009, p. 3, <<http://www.ched.uq.edu.au/Transitions/McLaren.PratoPaper.pdf>> accessed 1 August 2011.

³ McLaren, 'The rule of law in British colonial societies', p. 2.

⁴ D.M. Klerman and P.G. Mahoney, 'The value of judicial independence: Evidence from eighteenth-century England' in P. Brand, K. Costello, and W.N. Osborough (eds.), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference* (Dublin, Four Courts Press, 2005), pp. 139-160.

⁵ McLaren, 'The rule of law in British colonial societies', p. 3.

justice was far from unique in the settler colonies.⁶ Nonetheless, it was condemned by the reformist colonial press in Van Diemen's Land as an 'extraordinary system of government'.⁷

Presupposing an inevitable trajectory towards post-colonial self-government, whiggish histories of Van Diemen's Land/Tasmania regularly rehearse the arguments of settler activists, but rarely problematise the underlying assumptions of their aspirational rhetoric. The now-dominant Diceyan conception of the rule of law similarly inflects legal history critiques of Pedder's combined judicial and executive roles. Referencing A.V. Dicey's seminal *Introduction to the Study of the Law of the Constitution* (1885), this court-focussed definition of judicial independence is virtually synonymous with the doctrine of separation of powers.⁸ Through this lens, Pedder's central role in the administration of George Arthur underpins his characterisation as a 'pliant' judge,⁹ who supported the colonial government at the expense of constitutional development in some of the key contests over the extension of English liberties to Van Diemen's Land during the 1820s and 1830s. Again focussing on 'external' threats to judicial independence from other branches of government, the Diceyan rubric of separation of powers informs conventional readings of Pedder's 'redemptive' assertion of judicial independence in the face of gubernatorial pressure during the so-called 'Judge Storm' of 1847-1848.

In his groundbreaking historical reconceptualisation of *habeas corpus*, Paul

⁶ See especially J. McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial* (Toronto, University of Toronto Press, 2011).

⁷ *Colonial Times*, 26 May 1826, p. 2.

⁸ J. McLaren, 'The judicial office ... bowing to no power but the supremacy of the law: Judges and the rule of law in colonial Australia and Canada, 1788-1840', *Australian Journal of Legal History* 7 (2) (2003), p. 187. Dicey popularised the phrase 'rule of law', but his definition is considerably narrower than would have been understood by either liberals or conservatives in the early nineteenth century.

⁹ R.W. Giblin, *The Early History of Tasmania. Volume II* (Melbourne, Melbourne University Press/Oxford University Press, 1939), p. 469; J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. 48.

Halliday cautions against writing about ‘past ideas and practices as if their purpose was to make our own’.¹⁰ Heeding Halliday’s injunction – and making Pedder its focus – this chapter explores the points of divergence between the liberties-based discourses of the reformists (and their historians) and Pedder’s own conception of his official obligations. Privileging Pedder’s perspective, it reveals that an inherently legalistic, rather than constitutional, conception of the rule of law consistently informed his thinking. Drawing on Philip Hamburger’s revival of the ‘old, forgotten’ common-law ideals of judicial duty,¹¹ this chapter also emphasises the ‘internal’ protections of judicial independence which guided Chief Justice Pedder.¹² Following Hamburger, a close reading of Pedder’s correspondence and public statements reveals that they are infused with the language of duty.

In an age when colonial judges were appointed ‘at pleasure’, Pedder retained the support of the Colonial Office for thirty years by successfully negotiating his multiple roles. In the process, he has drawn strident criticism from settler activists and their historians. Section 6.1 revisits a series of early rule-of-law contests, in which Pedder has been condemned for abrogating judicial independence to government interests. Where conventional accounts are dominated by the language of submission, this section emphasises that Pedder’s own statements consistently deploy the language of duty.

Section 6.2 proposes a refocussed interpretation of the divergent test-case determinations of Chief Justices Pedder and Forbes on the touchstone issue of trial by jury. Illustrating Hamburger’s emphasis on the fundamental judicial duty to decide ‘in accord with the law of the land’,¹³ this section contrasts Forbes’ ‘rhetorical’ reading of the *New South Wales Act* (1823) with Pedder’s traditional ‘two-tier’ common-law analysis of legislative intent and

¹⁰ P.D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass., Belknap Press of Harvard University Press, 2010), p. 2.

¹¹ P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass., Harvard University Press, 2008), p. 16.

¹² Hamburger, *Law and Judicial Duty*, pp. 148, 159-163.

¹³ Hamburger, *Law and Judicial Duty*, p. 17.

his emphasis on the Blackstonian reception formula. An attentive reading of Pedder's justifications of his decision illustrates how his conception of judicial duty compelled him to resist popular pressure to deliver the same finding as Forbes.

Pedder's responsibility for legislative supervision under the 'repugnancy rule' is re-examined in section 6.3. Applying the interpretative paradigms of historically sensitive legal historiography, this section explores how Pedder's 1827 certification of newspaper licensing legislation highlights the varying modes of legal reasoning available to colonial judges. Criticised for judicial subservience in 1827, Pedder was lauded in 1848 for his firm response to gubernatorial accusations of 'neglect of duty' in certifying the *Dog Act* (1846). Resonating with Hamburger's emphasis on 'internal' independence, a close reading of Pedder's defence again emphasises that duty was at the core of his own conceptualisation of judicial independence.

6.1 Judicial duty: independence without separation of powers?

Under the *Act of Settlement* (1701), the independence of English judges from political interference was theoretically protected by life tenure 'during good behaviour'.¹⁴ In the British colonial world, on the other hand, judges were appointed 'at pleasure'. Accordingly, under the Charter of Justice (1823), Chief Justice Pedder was appointed by the Crown to 'hold his office during the Pleasure of us our heirs and successors and not otherwise'.¹⁵ Comparative colonial legal history points to some of the implications of this discretionary mode of appointment for directing judicial loyalties. As McLaren's wide-ranging analysis of the careers of 'maverick' judges in the British settler world illustrates, appointment to the colonial judiciary carried the imperial 'expectation' that officeholders would 'hew to a Baconian

¹⁴ Under 12 and 13 Will. III, c. 2, *An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject* (1701), judges in England were appointed during good behaviour ('*quamdiu se bene gesserint*'), and could only be removed 'upon address of both Houses of Parliament'. E. Campbell, 'Judicial review of proceedings for removal of judges from office', *UNSW Law Journal* 22 (2) (1999), p. 326.

¹⁵ Charter of Justice, 13 October 1823.

conception of the judicial role as one of loyal service to the Crown'.¹⁶ Referencing Francis Bacon's seventeenth-century injunction that judges should be 'lions under the throne',¹⁷ this model favours 'service to government above all else'.¹⁸ The opposing 'Cokeian' model – associated with Bacon's Stuart rival, Sir Edward Coke – represents an 'expansive understanding of the rule of law' and a commitment to the 'ascendancy of the legislative branch of the constitution'.¹⁹

With its roots in eighteenth-century empire, a 'Baconian colonial judiciary' retained its value into the nineteenth century.²⁰ As McLaren demonstrates, colonial jurists who favoured a 'Cokeian' conception of their role and actively challenged the political agendas of colonial governors or local elites risked removal from office.²¹ Judges in the Canadas, Cape Colony, New South Wales, and Van Diemen's Land were removed or recalled when they 'came into

¹⁶ J. McLaren, 'Men of principle or judicial ratbags? The trials and tribulations of maverick colonial judges in the nineteenth century or a funny way to run an empire', *Windsor Review of Law and Social Issues* 27 (2009), p. 147.

¹⁷ F.M. Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto, University of Toronto Press/Osgoode Society, 1993), p. 27. The quote is from Bacon, 'Of Judicature' in *Essays* (1601): 'Let judges also remember, that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty'. As attorney general and Lord Chancellor under James I, Bacon championed royal prerogative. M. Peltonen, 'Bacon, Francis, Viscount St Alban (1561–1626)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2007, <<http://www.oxforddnb.com/view/article/990>> accessed 11 August 2011.

¹⁸ McLaren, 'The judicial office', p. 183.

¹⁹ McLaren, *Dewigged, Bothered and Bewildered*, pp. 11–12. In contrast to Bacon, Coke has been lauded as an 'exponent of personal liberty and representative government' and 'the prototype of the activist judge', who laid the foundations for judicial review of legislation. A.D. Boyer, 'Coke, Sir Edward (1552–1634)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2009, <<http://www.oxforddnb.com/view/article/5826>> accessed 11 August 2011; J. McLaren, 'Reflections on the rule of law: The Georgian colonies of New South Wales and Upper Canada, 1788–1837' in D. Kirkby and C. Coleborne (eds.), *Law, History, Colonialism: The Reach of Empire* (Manchester, Manchester University Press, 2001), pp. 57–58.

²⁰ McLaren, *Dewigged, Bothered and Bewildered*, pp. 29, 39.

²¹ Under the provisions of the *Colonial Leave of Absence Act* (1782), judges and other officials could be suspended or 'amoved' from office by the Governor-in-Council. From 1828, colonial governors were further empowered to remove judges from office 'as the occasion may require'. While many ousted officials were subsequently employed in other colonies, rights of appeal were limited. P.A. Howell, 'The Van Diemen's Land Judge Storm', *University of Tasmania Law Review* 2 (3) (1966), p. 253; D.J. Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge, Cambridge University Press, 1991), p. 88.

conflict with the prevailing politico-legal power structure' or were 'just plain difficult to get on with'.²² Pedder's contemporary, John Walpole Willis, for example, was twice removed from office: in Upper Canada (1828), for his partisan stance in favour of colonial reformers; and in New South Wales (1843), where he 'offended almost everyone in sight, citizens and lawyers alike'.²³ Closer to home, a constitutional impasse over local revenue-raising legislation claimed Pedder's puisne judge, Algernon Montagu, who was removed by Governor Denison in 1847 on the pretext of personal debt.²⁴ In Sydney, even Chief Justice Forbes was brought into line by the threat of recall, following a series of disputes with the conservative Governor Darling.²⁵

Hamburger's revival of the common-law ideals of judicial duty adds a further dimension.²⁶ Under the rubric of separation of powers, he argues, judicial independence 'tends to be understood as legal protection from external threats'.²⁷ From this perspective, it is 'easy to assume that independence is centrally a matter of legal prohibitions protecting the power of one part of government from the power of another'.²⁸ Refocussing on the judicial office as an 'office of judgement', Hamburger argues that judges have a duty to act independently 'not merely of external, royal will, but most centrally, of their

²² McLaren, 'Men of principle or judicial ratbags?', p. 146.

²³ McLaren, 'Men of principle or judicial ratbags?', pp. 145, 151-152, 161-163. Like Pedder, Willis was an equity barrister who had attended Charterhouse and Trinity Hall, Cambridge. J.V. Barry, 'Willis, John Walpole (1793-1877)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/willis-john-walpole-2797/text3989>> accessed 11 August 2011.

²⁴ Howell, 'The Van Diemen's Land Judge Storm', pp. 255-260. Montagu was appointed to the Supreme Court in 1833, after serving as the colony's attorney general. P.A. Howell, 'Montagu, Algernon Sidney (1802-1880)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/montagu-algernon-sidney-2470/text3311>> accessed 11 August 2011; S. Petrow, 'Moving in an "eccentric orbit": The independence of Judge Algernon Sidney Montagu in Van Diemen's Land, 1833-47' in H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008), pp. 156-175.

²⁵ McLaren, *Dewigged, Bothered and Bewildered*, p. 155; Sir George Murray to Ralph Darling, 1 September 1828, *HRA* I, XIV, pp. 356-365.

²⁶ Hamburger, *Law and Judicial Duty*, p. 16.

²⁷ Hamburger, *Law and Judicial Duty*, p. 148.

²⁸ Hamburger, *Law and Judicial Duty*, p. 148.

own, internal will'.²⁹ In Hamburger's reading, the conventional guarantees of judicial independence – such as secure tenure and a fixed salary – are 'merely outward fortifications' of an office that is 'centrally defined by the old ideal of judgement undisturbed by will'.³⁰ This separation of duty and will provides a valuable conceptual frame through which to read Pedder's endeavours to reconcile competing professional obligations and personal inclination.

Like other judicial posts, the Chief Justiceship of Van Diemen's Land was an 'office of judgement' which could only be entered by taking an oath. In 1824, this included the medieval oath of judicial office and the oath of allegiance to the Crown.³¹ As Hamburger explains, oath-taking created a 'personal obligation to God' and 'bound' a judge to 'judge the law for himself on his conscience'.³² Pedder also swore separate oaths as an Executive Councillor and Legislative Councillor, and, as evidenced by his capacity to distinguish personal inclination from his judicial function in mandatory capital sentencing, for example, this series of obligations – and the imperative to separate duty from will – clarifies Pedder's protestation, at the time of his involuntary resignation from the Executive Council in 1836, that 'to say that I think [the duties of Councillor] incompatible with those of a Judge would be to tell a deliberate untruth'.³³

In contrast to Pedder's colonial reputation for impartiality on the bench in unpoliticised criminal trials, his construction as a puppet of government focusses on the intersection of judicial, executive and legislative functions in emerging constitutional contests, as free settler-colonists agitated for full access to their English 'birthright' – particularly the touchstone issues of trial

²⁹ Hamburger, *Law and Judicial Duty*, pp. 16, 148.

³⁰ Hamburger, *Law and Judicial Duty*, pp. 148-149, 158-159.

³¹ The oath of judicial office was prescribed under 20 Edw. III, c. 1 (1346). Under the *Huskisson Act* of 1828, the oath of judicial office in Van Diemen's Land and New South Wales was altered slightly, but retained the key promise to 'do equal right to the poor and the rich after my cunning, wit and power, and after the laws and customs of the realm and statutes made thereof'. Hamburger, *Law and Judicial Duty*, pp. 106-107; E. Campbell, 'Oaths and affirmations of public office', *Monash University Law Review* 25 (1) (1999), pp. 140-141, 144.

³² Hamburger, *Law and Judicial Duty*, p. 109.

³³ Pedder to Arthur, 1 March 1836, Arthur Papers, vol. 10, ML ZA 2170. Original emphasis.

by jury and freedom of the press. As Robert Fraser has identified in the Canadian colonial context, the 'intimate' link between the judiciary and the executive, in the person of the chief justice, 'brought the judiciary within the framework of opposition criticism of executive misrule'.³⁴ Pedder's close personal and political association with Governor Arthur adds another layer to condemnation of his *ex officio* advisory roles. As in Upper Canada, Van Diemen's Land settler critiques reveal the 'interplay of interest, grievance and constitutional rhetoric'.³⁵ Colonial critics of Pedder's role as a 'component part' of the government were also fervent opponents of Arthur's autocratic style of governance.³⁶

As Hamburger highlights, there had long been potential for a judge's advisory role to be manipulated, as when the sovereign (or his vice-regal representative) sought to 'precommit' a judge on a question that would come before him on the bench.³⁷ In Van Diemen's Land, this potential for manipulation became the focus of key clashes over Pedder's membership of the executive government. Critically engaging with the interpretative frames provided by McLaren and Hamburger, this section reassesses Pedder's role in key conflicts over judicial independence: the removal from office of the attorney-general in 1825-26, and the 'Bryan case' of the mid-1830s.

During the course of 1825, Attorney-General J.T. Gellibrand's 'mischievous' private association with anti-Arthur newspaper editor, R.L. Murray, 'destroy[ed] the entire confidence which it is absolutely necessary that the Government should be able to repose in [the attorney-general] for the zealous exercise of his powers in support of its dignity'.³⁸ At about the same time, the complete breakdown of Governor Darling's relationship with his

³⁴ Fraser, 'All the privileges which Englishmen possess', p. lxxv.

³⁵ Fraser, 'All the privileges which Englishmen possess', p. lv.

³⁶ *Colonial Times*, 2 June 1826, p. 2.

³⁷ Hamburger, *Law and Judicial Duty*, pp. 151-152.

³⁸ Report of the Commission of Inquiry, *HRA* III, V, pp. 64-87; E. Campbell, 'Trial by commission: The case of Joseph Tice Gellibrand', *Tasmanian Historical Research Association Papers and Proceedings* 34 (3) (1987), pp. 71-72.

attorney-general, Saxe Bannister, and the subsequent 'logistical problems' associated with securing libel convictions against Sydney pressmen illustrates that an effective working relationship between governor and chief prosecutor was essential for the administration of justice.³⁹ From Pedder's perspective, the fact that Murray was a 'known systematic opposer and calumniator of the government was', he confirmed to Arthur, 'enough to make it highly improper for the Attorney-General to be living in habits of intimacy, or indeed to have any but official intercourse, with him'.⁴⁰ A more 'proper' course was pursued by Pedder's old friend in New South Wales. Soon after the arrival of Governor Darling, for example, Bannister refused to attend a dinner at Government House because the editor of the anti-government *Australian*, Robert Wardell, had also been invited (in his capacity as a barrister). Bannister explained that mixing with Wardell 'would induce the public to feel that libels are not disapproved of by the government'.⁴¹

In Hobart Town, questions were also raised about Gellibrand's personal ethics, when the Colonial Office relayed information about his creditors in England.⁴² Decisively, however, Gellibrand came under professional scrutiny when the Solicitor-General, Alfred Stephen, supplied the pretext for an investigation by threatening to resign. In an attempt to have Gellibrand 'struck off the Rolls' of the Supreme Court, Stephen accused him of malpractice for taking pleadings from both sides in the civil case of *Laurie v. Griffiths* [1825].⁴³ Pedder heard Stephen's motion in September and October 1825, but ultimately dismissed it, with the finding that no 'wrong'

³⁹ B. Edgeworth, 'Defamation law and the emergence of a critical press in colonial New South Wales, 1824-1831', *Australian Journal of Law and Society* 6 (1990), p. 62.

⁴⁰ Pedder to Arthur, 11 September 1825, Arthur Papers, vol. 9, ML ZA 2169.

⁴¹ Edgeworth, 'Defamation law and the emergence of a critical press', pp. 54-55.

⁴² Wilmot Horton to Arthur, 22 February 1825, *HRA* III, IV, p. 241.

⁴³ *Laurie v. Griffiths* [1825], B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/laurie_v_griffiths/> accessed 1 January 2012; Campbell, 'Trial by commission', p. 73.

had been committed which the court had the 'power to punish'.⁴⁴

While the case was still before the Supreme Court, Arthur appointed the chief justice to chair a simultaneous executive commission of inquiry into Gellibrand's alleged malpractice. This commission met *in camera* at Pedder's official residence during September and November. The commission had no power to compel witnesses or make legally binding recommendations. Gellibrand initially appeared to defend himself, but later refused to attend; the commissioners continued to sit in his absence. Their report was submitted to Arthur at the end of December, and then reviewed by the Executive Council – several members of which, including Pedder, had served as commissioners.

Echoing the anti-government press and the complaints of the aggrieved law officer himself,⁴⁵ conventional commentaries censure Pedder for consenting to chair what the *Colonial Times* decried as a 'most unconstitutional and truly Anti-English Tribunal'.⁴⁶ Devoting a chapter to Gellibrand's removal in *The Early History of Tasmania* (1939), R.W. Giblin asserts that Pedder 'retreated from the Seat of Independence ... and consented to become ... an Investigator of Deportment'.⁴⁷ Echoing Giblin, J.M. Bennett censures Pedder for a 'complete abdication of judicial propriety'.⁴⁸ In an unreferenced article that is still cited as a standard source, R.W. Baker goes so far as to accuse Pedder

⁴⁴ In re Gellibrand [1825], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/in_re_gellibrand/> accessed 1 January 2012.

⁴⁵ See J.T. Gellibrand, *The Proceedings in the Case of His Majesty's Attorney-General, J.T. Gellibrand, Esq. as well in the Supreme Court of Van Diemen's Land, as upon the late Private Investigation, including the Correspondence with His Excellency Lieutenant Governor Arthur, and the Honourable Chief Justice Pedder, and all the Other Documents connected with this Most Important Case, in Two Parts* (Hobart Town, A. Bent, 1826).

⁴⁶ *Colonial Times*, 7 October 1825, p. 2; and cf. Henry Melville's account of this 'inquisitorial examination'. G. Mackaness (ed.), Henry Melville, *The History of Van Diemen's Land from the Year 1824 to 1835 Inclusive, During the Administration of Lieutenant-Governor George Arthur* (Sydney, Horwitz, 1965; originally published London, Smith and Elder, 1835), pp. 45-46.

⁴⁷ Giblin, *The Early History of Tasmania*, p. 468.

⁴⁸ Bennett, *Sir John Pedder*, p. 38. Notably, Bennett's critique of Pedder hardens between his initial pilot study of 1977 and longer judicial biography of 2003. Compare J.M. Bennett, *Sir John Pedder: First Chief Justice of Tasmania* (Hobart, University of Tasmania, 1977), pp. 14-20, and *Sir John Pedder* (2003), pp. 29-47.

of 'perfidy' of biblical proportions for agreeing to chair the commission.⁴⁹ In perhaps the most nuanced account of the amoval, constitutional scholar Enid Campbell explains that, while Gellibrand was certainly treated unfairly, there was 'nothing strictly illegal or unconstitutional about the proceedings' against him.⁵⁰

Giblin, Bennett and Campbell are all concerned to assess Pedder's conduct. Instead of framing their conclusions within a historically contingent 'set of standards', as identified by McLaren,⁵¹ these conventional narratives unreflexively judge him 'by today's standards'.⁵² Pedder's 'error', Campbell concludes from the standpoint of 1987, 'was that of allowing himself to be used by Arthur' to remove a 'servant of the Crown who had shown himself insufficiently servile to the vice-regal representative'.⁵³ Strikingly, all three accounts evocatively deploy the language of submission. Bennett's construction of Pedder's servility is particularly explicit, as he chronicles a damning sequence of events in which Pedder's 'judgement had become so clouded' that he allowed himself to be 'importuned' and 'overborne'.⁵⁴ Under 'pressure' from Arthur, Bennett argues, Pedder 'buckled': his 'submission was absolute and abject'.⁵⁵

Similarly, Pedder's circuitous reflections on his authority and responsibility to investigate the allegations of Gellibrand's malpractice are conventionally read as evidence of vacillation, as the chief justice first asserts that he has no authority to hear the matter outside the Supreme Court, and then accepts the role of extra-curial commissioner. Following Hamburger, an attentive reading of Pedder's statements indicates that he was deeply concerned to identify

⁴⁹ R.W. Baker, 'The early judges in Tasmania', *Tasmanian Historical Research Association Papers and Proceedings* 8 (4) (1960), pp. 74-75. Pedder's change of heart is likened to Peter's threefold betrayal of Christ.

⁵⁰ Campbell, 'Trial by commission', p. 69.

⁵¹ McLaren, 'The rule of law in British colonial societies', p. 3.

⁵² Campbell, 'Trial by commission', p. 74.

⁵³ Campbell, 'Trial by commission', p. 79. Editorial emphasis.

⁵⁴ Bennett, *Sir John Pedder*, p. 38. Giblin appears to be Bennett's chief secondary source.

⁵⁵ Bennett, *Sir John Pedder*, pp. 38-39.

and explain his competing duties, and to maintain the ‘internal independence’ demanded by his oath of office. Reporting an initial conference with Stephen and Gellibrand before the matter came before the court, for example, Pedder explicitly framed his reading of the situation in terms of duty – not only to his judicial office, but to the legal profession, the settler-colonists, and Stephen and Gellibrand. Having considered Stephen’s statements against Gellibrand, Pedder advised Arthur that he could not pursue the matter unless Stephen put his charges before the court ‘in a tangible shape’.⁵⁶ ‘This I felt and do still *feel myself compelled to do*’, he explained, ‘by a consideration of the *Duty I owe* to the profession of which we are all members, to the community who are so deeply interested in the honor [*sic*] and integrity of that profession, and to the parties themselves’.⁵⁷

By 8 September, Stephen had not made any formal representation to the court, and Pedder reaffirmed that he had ‘no ... power by [his] office’ to institute an inquiry into Gellibrand’s conduct.⁵⁸ As a result, he told Arthur, it was ‘only in Court, I conceive, either in the trial of an action, or upon motion, that my office will enable me to inquire into the truth of such misconduct’, and only upon motion that he could ‘officially ... punish or prevent it’.⁵⁹ If the matter had ‘ended here’, Bennett floridly asserts, ‘Pedder’s judicial standing would have been enhanced and his independence would have redounded to his enduring credit’.⁶⁰ But this was not the end of Pedder’s advice. His letter of 8 September continues, and identifies a series of considerations which led him to the conclusion that it was ‘*peculiarly my duty* to guard the purity of practice in the Court by punishing those who are guilty of a violation of it’.⁶¹ While he ‘declined to institute a proceeding in the matter [outside the court]

⁵⁶ Pedder to Arthur, 27 August 1825, CO 280/7, f. 94a, AJCP reel PRO 233.

⁵⁷ Pedder to Arthur, 27 August 1825, CO 280/7, f. 94a, AJCP reel PRO 233. Editorial emphasis.

⁵⁸ Pedder to Arthur, 8 September 1825, CO 280/7, f. 118a, AJCP reel PRO 233.

⁵⁹ Pedder to Arthur, 8 September 1825, CO 280/7, f. 118a, AJCP reel PRO 233.

⁶⁰ Bennett, *Sir John Pedder*, p. 37.

⁶¹ Pedder to Arthur, 8 September 1825, CO 280/7, f. 119, AJCP reel PRO 233.

as it now stands unless furnished with some precedent for so doing',⁶² Pedder could not ignore the fact that Stephen's charges of professional misconduct had been 'made publicly', referred to the chief justice 'officially', and 'intimated to the Attorney-General as existing'.⁶³

The charges did not 'necessarily relate to cases in which the Crown was directly interested', but, Pedder reasoned, their 'notoriety' meant that the Supreme Court and the 'whole body of Gentlemen who practise in it, would be liable to be confounded in one common disgrace'.⁶⁴ Unless 'some step' were 'taken to establish the truth of these charges [against Gellibrand], and put an end to the misconduct imputed by them', he feared that public confidence in the court and the legal profession would be undermined.⁶⁵ The only way to punish malpractice was for the matter to be 'brought before the Court by some one', and Pedder 'did not hesitate to call upon the Solicitor-General to take this step'.⁶⁶ Emphasising that the judge was not the only officer of the court with a moral obligation in this matter, Pedder observed that it was '*equally the duty* of the Solicitor-General to attend to it'.⁶⁷ Pedder was not aware of a 'civil or professional obligation' upon the solicitor-general that he could 'enforce', but could not 'refrain from repeating' to Arthur that 'I think it was *my duty to my office, to those who practise in the Court, and to the Community* who are so directly interested in their honor [*sic*] and integrity' to call upon Stephen to advance the matter in court.⁶⁸

In contrast to the conventional emphasis on submission and the abdication of judicial propriety, duty offers a new frame for interpreting Pedder's decision

⁶² Pedder to Arthur, 8 September 1825, CO 280/7, f. 119, AJCP reel PRO 233.

⁶³ Pedder to Arthur, 8 September 1825, CO 280/7, f. 119, AJCP reel PRO 233.

⁶⁴ Pedder to Arthur, 8 September 1825, CO 280/7, f. 119, AJCP reel PRO 233.

⁶⁵ Pedder to Arthur, 8 September 1825, CO 280/7, f. 119, AJCP reel PRO 233.

⁶⁶ Pedder to Arthur, 8 September 1825, CO 280/7, ff. 119-119a, AJCP reel PRO 233.

⁶⁷ Pedder to Arthur, 8 September 1825, CO 280/7, ff. 119-119a, AJCP reel PRO 233.

⁶⁸ Pedder to Arthur, 8 September 1825, CO 280/7, f. 119a, AJCP reel PRO 233; and cf. Pedder to Arthur, 27 August 1825, CO 280/7, f. 94a, AJCP reel PRO 233, in which he uses almost identical language.

to accept the chair of the extra-curial commission of inquiry into Stephen's allegations. Writing to Arthur on 9 September 1825, Pedder consistently reiterates the theme: '*I feel myself bound ... to submit to this Duty* since Your Honor [*sic*] thinks it necessary for the public Service *to lay it upon me*'.⁶⁹ This letter also introduces another theme that is central to Hamburger's articulation of 'internal' judicial independence – the ability to subjugate personal will to official duty. Suggesting that Pedder was grappling with conflict between the two, he candidly acknowledged that he accepted Arthur's commission 'much as I should *personally desire* to be exempt from the unpleasant office of an Enquirer into the Conduct of any Servant of the Crown'.⁷⁰

The Gellibrand amoval was twice reviewed in London. An official inquiry in 1826 found no illegality in Pedder's conduct,⁷¹ and the Colonial Office dismissed renewed complaints from Gellibrand in 1836, when he petitioned the king to impeach Pedder for judicial behaviour that was 'arbitrary, malevolent, unjust and illegal'.⁷² Following another campaign of settler complaints, Pedder's official conduct in the 'Bryan case' was also investigated by the Colonial Office. 'Mr Bryan's case' caused a 'considerable sensation' which continues to attract scholarly attention.⁷³ Usually read from the settler-activist perspective, conventional accounts share the condemnation of the 'junction of [Pedder's] two offices' as chief justice and Executive Councillor, and link the case directly to Pedder's forced resignation from the Executive Council in 1836.⁷⁴ Reread from Pedder's standpoint, the case

⁶⁹ Pedder to Arthur, 9 September 1825, CO 280/7, ff. 130-130a, AJCP reel PRO 233. Editorial emphasis.

⁷⁰ Pedder to Arthur, 9 September 1825, CO 280/7, ff. 130-130a, AJCP reel PRO 233. Editorial emphasis.

⁷¹ See Bennett, *Sir John Pedder*, pp. 45-46, who dismisses the review by Deputy-Judge Advocate Howell as a 'whitewash'.

⁷² 9 July 1836, CO 280/66, f. 340, cited in Bennett, *Sir John Pedder*, p. 47. See also the opinion of Serjeant Talfourd obtained by Gellibrand in 1835, cited in G. Mackaness (ed.), Henry Melville, *The History of Van Diemen's Land from the Year 1824 to 1835 Inclusive, During the Administration of Lieutenant-Governor George Arthur* (Sydney, Horwitz, 1965; originally published London, Smith and Elder, 1835), p. 46n.

⁷³ Melville, *History of Van Diemen's Land*, p. 147.

⁷⁴ *Colonial Times*, 3 November 1835, p. 4. For colonial accounts, see Melville, *History of Van*

neatly illustrates Fraser's point about the 'interplay of interest, grievance and constitutional rhetoric'.⁷⁵ Through the lens of judicial duty, it also highlights Pedder's obligation to separate his judicial and executive roles.

The 'Bryan case' is a convenient shorthand for the series of disputes between William Bryan, his supporters, and the Arthur administration. A wealthy Irish settler-colonist who arrived in Van Diemen's Land in 1824, Bryan became the 'outspoken and untiring leader' of the government's opponents.⁷⁶ In November 1833, one of Bryan's convict servants was convicted of cattle stealing. After the trial, Launceston Police Magistrate, William Lyttleton, was heard to imply publicly that it should have been Bryan in the dock. Bryan's friend, Thomas Lewis, conveyed a challenge to a duel, for which he was later convicted of inciting a breach of the peace.⁷⁷

When Bryan attempted to resign as a magistrate, Governor Arthur dismissed him on the advice of the Legislative Council,⁷⁸ and the Executive Council subsequently approved the removal of Bryan's assigned convict servants mid-harvest, in what anti-Arthur pressman Henry Melville condemned as a 'blow ... no doubt considered ... as necessary to mark their displeasure at the conduct of Mr Bryan!'⁷⁹ When Pedder refused to allow civilian jury trials in Bryan's civil actions for defamation and trespass against Lyttleton and John

Diemen's Land, pp. 147-153. A.G.L. Shaw (ed.), John West, *The History of Tasmania* (Sydney, Angus and Robertson, 1981; originally published Launceston, Henry Dowling, 1852), pp. 128-131. For scholarly interpretations, from slightly different perspectives, see Bennett, *Sir John Pedder*, pp. 90-94; L.L. Robson, *A History of Tasmania, Volume I: Van Diemen's Land from the Earliest Times to 1855* (Melbourne, Oxford University Press, 1983), pp. 296-300, 311-312; and A.G.L. Shaw, *Sir George Arthur, Bart., 1784-1854. Superintendent of British Honduras, Lieutenant-Governor of Van Diemen's Land and of Upper Canada, Governor of the Bombay Presidency* (Melbourne, Melbourne University Press, 1980), pp. 162-164.

⁷⁵ Fraser, 'All the privileges which Englishmen possess', p. lv.

⁷⁶ Shaw, *Sir George Arthur*, p. 162.

⁷⁷ R. v. Lewis [1834], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1834/r_v_lewis/> accessed 1 January 2012.

⁷⁸ Melville, *History of Van Diemen's Land*, p. 148, which reproduces a Government Notice to this effect, dated 28 November 1833.

⁷⁹ *Colonial Times*, 3 November 1835, p. 4; and Melville, *History of Van Diemen's Land*, p. 149.

Hortle, the official who had removed his convict servants,⁸⁰ a 'constitutional and political grievance' was added to the mix, and Arthur's critics rallied to Bryan's 'cause'.⁸¹ Bryan discontinued his civil actions in the Supreme Court, and sought redress in England. In his absence, his nephew, Robert Bryan, was convicted of cattle stealing and imprisoned at the penal station at Port Arthur.⁸² As John West records, 'It was commonly asserted that he was sacrificed; if not by the contrivance, [then] with the concurrence of the government'.⁸³

In November 1835, Henry Melville published an editorial in the *Colonial Times* which strongly criticised Pedder's dual roles as chief justice and Executive Councillor. Observing that Bryan had been refused civilian jury trials in his civil actions against Lyttleton and Hortle, Melville directed readers' attention to the 'awkward situation in which his Honor [*sic*] the Chief Justice was placed on this occasion'.⁸⁴ As a member of the Executive Council, Pedder had 'already decided against Mr Bryan, and had approved of the Government punishing that gentleman, by depriving him of his assigned servants'.⁸⁵ As chief justice, Pedder was then called on to 'decide a question, upon which he had already come to a decision'.⁸⁶ Thus, Melville argued, the 'very man to whom Mr Bryan appealed for the impartial administration of justice' was the 'very Executive Councillor [who] had ... faithfully and conscientiously advised the Government to do that very deed, which compelled Mr Bryan to have recourse to the laws of his country for redress'.⁸⁷

⁸⁰ For Bryan's attempted civil actions against Lyttleton, and the Chief Constable, John Hortle, see Bryan v. Lyttleton [1834] *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1834/bryan_v_lyttleton/> accessed 1 January 2012.

⁸¹ Shaw, *Sir George Arthur*, pp. 162, 163.

⁸² R. v. Bryan and Stewart [1835], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/r_v_bryan_and_stewart/> accessed 1 January 2012.

⁸³ West, *History of Tasmania*, p. 130.

⁸⁴ *Colonial Times*, 3 November 1835, p. 4.

⁸⁵ *Colonial Times*, 3 November 1835, p. 4.

⁸⁶ *Colonial Times*, 3 November 1835, p. 4.

⁸⁷ *Colonial Times*, 3 November 1835, p. 4.

Turning to the proceedings against Bryan's nephew, Melville went on to assert that the jury in Robert Bryan's case 'had been packed' with men loyal to Arthur.⁸⁸ Bryan's challenge to a military juror had been rejected by the chief justice: as Pedder explained to the court and the Colonial Office, he had understood that the 'prisoner and his council [*sic*] appeared by their silence to acquiesce'.⁸⁹ Melville's editorial favoured a more sinister reading, however, and urged readers to 'remember ... this is the same Judge that recommended the first proceedings against Mr William Bryan in the Executive Council!'⁹⁰ For thus bringing 'the public administration of justice ... into ridicule and contempt', Melville was tried for contempt of court.⁹¹

Melville's defence highlights his central critique of the linked offices of chief justice and Executive Councillor.⁹² Quoting from Lord Eldon and Sir William Blackstone on the 'dangerous' union of a judge and a member of the executive government, Melville also 'observe[d] that ... Chief Justice Forbes, at Sydney, refused to sit in the Executive Council, not wishing to place himself in such a precarious situation as that in which [Pedder] now appears'.⁹³ Emphasising liberal constitutional fears of 'terrible oppression', Melville argued that the 'junction of these two offices is an evil to the Colony ... which I cannot think the British Government ever intended should be permitted to exist, because such an [*sic*] union of power is unknown in Great Britain'.⁹⁴ In

⁸⁸ In re Melville [1835], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/in_re_melville/> accessed 1 January 2012; R. v. Bryan and Stewart [1835].

⁸⁹ In re Melville [1835]; Pedder to [Acting Lieutenant-Governor] Snodgrass, 26 November 1836, CO 280/69, ff. 39-39a, AJCP reel PRO 271.

⁹⁰ *Colonial Times*, 3 November 1835, p. 4.

⁹¹ In re Melville [1835].

⁹² In re Melville [1835]. Melville cites the 'parliamentary report of a speech of his Lordship' of 3 March 1806, in which Eldon spoke against the appointment of Lord Chief Justice Ellenborough to a seat in the Cabinet, arguing that it was 'not enough that the Administration of Justice should be perfectly free and uninfluenced by Government, [but] it should be beyond the reach of suspicion'. See *The Parliamentary Debates from the Year 1803 to the Present Time: Forming a Continuation of the Work entitled 'The Parliamentary History of England from the earliest Period to the Year 1803'*. Published under the Superintendence of T.C. Hansard, Vol. VI, *Comprising the Period from the Twenty-First Day of January to the Sixth Day of May 1806* (London, T.C. Hansard, Printer, 1812), pp. 263-264.

⁹³ In re Melville [1835].

⁹⁴ In re Melville [1835].

short, he ‘insinuate[d] that the Court [was] base enough to lend itself to the Government for the purpose of injustice’.⁹⁵

As with Gellibrand’s case, Pedder’s official conduct was investigated by the Colonial Office; again, the chief justice was largely vindicated. Governor Arthur was censured for allowing contempt proceedings against Melville, whose sentence was remitted,⁹⁶ but the Colonial Office refused to review William Bryan’s complaints about his treatment in the Supreme Court, on the basis that the Secretary of State for the Colonies found himself ‘bound to presume’ that the judicial decisions of which Bryan complained ‘proceeded upon just and adequate grounds’.⁹⁷ Confirming the court’s independence, the Colonial Office declared that it was ‘not within the province of the Executive Government to review any judgements of the legal Tribunals of the Colony’.⁹⁸ Indicating that Pedder’s Baconian conception of his duty ensured support at the Colonial Office, Lord Glenelg confirmed, via the new lieutenant-governor, Sir John Franklin, that ‘Mr Pedder may be assured that the charges preferred against him have not impaired, in the slightest degree, the confidence which has been for so many years reposed by His Majesty’s Government in his disposition, and ability to promote the most important interests of the Colony’.⁹⁹

From early 1837, the colonial press speculated that Pedder would be knighted, and promoted to the Chief Justiceship of New South Wales following Forbes’ retirement.¹⁰⁰ When machinations in London meant that Mr Justice Dowling (already in Sydney) succeeded to the post, Pedder remained in Van Diemen’s Land. Tracing the influence of Dowling’s brother –

⁹⁵ In re Melville [1835].

⁹⁶ Bennett, *Sir John Pedder*, p. 94.

⁹⁷ James Stephen to Bryan, 24 September 1835, CO 280/92, ff. 33a-34, AJCP reel PRO 286; Bennett, *Sir John Pedder*, pp. 93-94.

⁹⁸ James Stephen to Bryan, 24 September 1835, CO 280/92, ff. 33a-34, AJCP reel PRO 286; Bennett, *Sir John Pedder*, p. 93.

⁹⁹ Glenelg to Sir John Franklin, 29 December 1836, CO 408/12, f. 334, AJCP reel PRO 291; Bennett, *Sir John Pedder*, p. 47.

¹⁰⁰ See, for example, *Sydney Gazette*, 31 January 1837, p. 2; *Colonial Times*, 19 September 1837, p. 7.

a newspaper editor who lobbied the Colonial Office vigorously¹⁰¹ – Bennett suggests that Pedder received a knighthood as a ‘consolation prize’.¹⁰² The contemporary use of imperial honours to secure and reward allegiance provides a broader context in which to read Pedder’s knighthood. As Bruce Knox identifies, knighthoods for colonial judges served multiple purposes during the nineteenth century.¹⁰³ They added prestige to judicial office and the colonial court, and could also be regarded as an acknowledgement of personal career distinction. Honours were also a powerful means of binding colonial officials to the imperial centre.¹⁰⁴ Pedder’s own response to his knighthood suggests that he valued it as a personal honour and, more importantly, as evidence of imperial approbation of his professional performance in Van Diemen’s Land.

Pedder’s knighthood was gazetted on 27 November 1838.¹⁰⁵ In a letter to the Secretary of State for the Colonies dated 16 April 1839, Pedder gratefully acknowledged Lord Glenelg’s personal imprimatur: ‘I cannot but consider that I owe this mark of Her Majesty’s condescension to the favour with which Your Lordship has been pleased to view my humble endeavours to discharge the *duties of my office*’.¹⁰⁶ This was more than a formulaic expression of deference. Secretary of State since 1835, Glenelg had been forced to resign from the Colonial Office only two months before Pedder’s letter.¹⁰⁷ Rumours

¹⁰¹ J.M. Bennett, *Lives of the Australian Chief Justices. Sir James Dowling: Second Chief Justice of New South Wales, 1837-1844* (Sydney, The Federation Press, 2001), pp. 106-108; and *Sir John Pedder*, p. 83. From 1824, journalist and government informer, Vincent Dowling, was editor of the influential *Bell’s Life in London*. T. Mason, ‘Dowling, Vincent George (1785-1852)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004, <<http://www.oxforddnb.com/view/article/7970>> accessed 1 August 2011.

¹⁰² Bennett, *Sir John Pedder*, p. 84.

¹⁰³ B. Knox, ‘Democracy, aristocracy and empire: The provision of colonial honours, 1818-1870’, *Australian Historical Studies* 25 (99) (1992), pp. 246-247.

¹⁰⁴ Z. Laidlaw, *Colonial Connections, 1815-45: Patronage, the Information Revolution and Colonial Government* (Manchester, Manchester University Press, 2005), p. 108.

¹⁰⁵ *London Gazette*, 27 November 1838, p. 2715.

¹⁰⁶ Pedder to Glenelg, 16 April 1839, CO 280/117, f. 199, AJCP reel PRO 491. Editorial emphasis.

¹⁰⁷ Glenelg was forced from the Colonial Office when ministerial colleagues doubted his capacity to handle a conflict with planters in Jamaica over the emancipation of slaves. G. Martin, ‘Grant, Charles, Baron Glenelg (1778-1866)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008,

of his resignation had been circulating in the colonial press, and news of their confirmation had reached Van Diemen's Land by March 1839.¹⁰⁸ Offering implicit support to the former Secretary of State – and perhaps mindful of the political pressure behind his own involuntary resignation from the Executive Council in 1836 – Pedder reiterated the 'deep sense I have of Your Lordship's goodness to me'.¹⁰⁹ He further affirmed that the 'value' of his knighthood was 'greatly enhanced by the circumstances of its being conferred upon me during the period of Your Lordship's administration of the affairs of the Colonies'.¹¹⁰

Pedder's gratitude towards Glenelg underscores the sense of his own insecure tenure. Conscious of holding his colonial appointment 'at pleasure', the chief justice recognised that he owed his official survival to support from the Colonial Office. Alluding to the complaints of Gellibrand, Bryan and Melville, Pedder acknowledged that his 'Lordship had been called upon, in more than one instance, to enquire into my official conduct'.¹¹¹ As confirmation of Colonial Office support, the 'high' honour of a knighthood therefore represented both personal and professional vindication.¹¹² For a man who valued his character so highly, this was significant. Apparently basking in Pedder's reflected glory, the fickle colonial press reacted positively to the new status of 'our excellent Chief Justice'.¹¹³ The *Hobart Town Courier* declared that 'all parties in this colony are equally disposed to acquiesce' in proclaiming the 'justice' of this 'mark of Royal favour'.¹¹⁴ Even Melville's *Colonial Times* applauded the 'strictest integrity ... and the most undeviating independence and impartiality' of the judge.¹¹⁵

<<http://www.oxforddnb.com/view/article/11249>> accessed 1 August 2011.

¹⁰⁸ See, for example, *Colonial Times*, 12 March 1839, p. 5.

¹⁰⁹ Pedder to Glenelg, 16 April 1839, CO 280/117, f. 199a, AJCP reel PRO 491.

¹¹⁰ Pedder to Glenelg, 16 April 1839, CO 280/117, f. 199a, AJCP reel PRO 491.

¹¹¹ Pedder to Glenelg, 16 April 1839, CO 280/117, ff. 199-199a, AJCP reel PRO 491.

¹¹² Pedder to Glenelg, 16 April 1839, CO 280/117, f. 199a, AJCP reel PRO 491.

¹¹³ *Colonial Times*, 26 March 1839, p. 7.

¹¹⁴ *Hobart Town Courier*, 29 March 1839, p. 2.

¹¹⁵ *Colonial Times*, 26 March 1839, p. 7.

6.2 Trial by jury: 'I am not at liberty to adopt' the 'opinion of others'

In his inaugural address to the Supreme Court, Attorney-General Gellibrand lauded the court's opening on 24 May 1824 as a day on which 'the rights and privileges of the subject' were secured.¹¹⁶ Gellibrand's speech was infused with the spirit of constitutionalism which characterised English legal culture. Quoting Blackstone's 'encomium' on the 'glory of the English law', Gellibrand extolled trial by jury as the 'most transcendant [*sic*] privilege which any subject can enjoy or wish for; that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals'.¹¹⁷ In English common law, Gellibrand explained, grand and petty juries were 'so blended ... that it is next to impossible to separate them'.¹¹⁸ His focus, however, was the common or petty jury, which determined questions of fact. Under the Act of 1823, his own office of attorney-general had assumed the accusatorial function of the grand jury.¹¹⁹

Free settler-colonists in Van Diemen's Land agitated for their 'English liberties' on the basis of the Blackstonian reception doctrine that 'if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject, are immediately in force'.¹²⁰ Gellibrand expressed this principle, widely recited within the Anglophone settler-colonial world, reminding the court

¹¹⁶ *Hobart Town Gazette*, 28 May 1824, p. 2. One of these rights was access to the prerogative writ of *habeas corpus*. Soon after its introduction, the *Hobart Town Gazette* praised Pedder for the 'excellent Magisterial example' of attending a prisoner in the gaol to hear his application. *Hobart Town Gazette*, 29 October 1824, p. 3; In re Warton [1824], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/in_re_warton/> accessed 1 January 2012. On Pedder's more 'activist' use of the writ than Forbes, see Halliday, *Habeas Corpus*, p. 294.

¹¹⁷ *Hobart Town Gazette*, 28 May 1824, p. 2.

¹¹⁸ R. v. Magistrates of Hobart Town [1825], *Decisions of the Nineteenth Century Tasmanian Superior Courts* <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_magistrates_of_hobart_town/> accessed 1 January 2012.

¹¹⁹ 4 Geo. IV, c. 96, s. 4; *Hobart Town Gazette*, 28 May 1824, p. 2.

¹²⁰ Blackstone, *Commentaries*, Introduction, Section the Fourth: On the countries subject to the laws of England, pp. 104-105; W. Prest, 'Antipodean Blackstone: The *Commentaries* "Down Under"', *Flinders Journal of Law Reform* 6 (2) (2003), p. 158.

that

these boons, privileges, and blessings are the birthright of every Englishman – and though I am removed far from the country that gave me birth, I am bound to say, that, standing in this remote part of the world (through His Majesty's most gracious Charter), I possess and enjoy them here.¹²¹

As Halliday explains, whereas property law was 'spatially bounded', laws concerning British subjects were 'bounded only by [their] relationship of allegiance' to the sovereign.¹²² The subject's liberties were protected in exchange for that allegiance. Subjecthood was not altered by the territorial location of the subject, and could only be surrendered when allegiance was consciously transferred to another sovereign. The subject status of settler-colonists notwithstanding, Blackstone allowed for a 'patchwork of reception' of English law and legal culture in the varied colonial spaces inhabited by Britons.¹²³ There were 'very many and very great restrictions', he cautioned, and colonists could 'carry with them only so much of the English law as is applicable to their new situation and the condition of an infant colony'.¹²⁴ Reiterating this Blackstonian reception formula, Pedder explained his judicial perspective on Van Diemen's Land: 'this colony is strictly English; and ... Colonists bring with them, as their birthright, all the English laws so far as they are not affected by any particular Act of Parliament'.¹²⁵

The campaign for trial by (civilian) jury in the southern colonies hung on this tension between the assertion of ancient constitutional 'birthrights',¹²⁶ and the Blackstonian restriction of those rights by the 'condition' of the colony and by statute law. In New South Wales and Van Diemen's Land, the liberties

¹²¹ *Hobart Town Gazette*, 28 May 1824, p. 2.

¹²² Halliday, *Habeas Corpus*, p. 265.

¹²³ I. Holloway, 'Sir Francis Forbes and the earliest Australian public law cases', *Law and History Review* 22 (2) (2004), p. 225.

¹²⁴ This 'significant qualifying rider' appeared in a 'Supplement to the first Edition, containing the most material Corrections and Additions in the Second'. Prest, 'Antipodean Blackstone', p. 158.

¹²⁵ *R. v. Magistrates of Hobart Town* [1825].

¹²⁶ See, for example, V. Windeyer, "'A birthright and an inheritance': The establishment of the rule of law in Australia", *University of Tasmania Law Review* 1 (1962), pp. 635-669.

of free British subjects came into conflict with the exigencies of a penal colony, because the free settler population was numerically dominated by transported convicts. Since the First Charter of Justice of 1787, ancient common-law rights including trial by jury had been removed, or introduced in altered form, by imperial statute. As the Secretary of State for the Colonies acknowledged in 1817, free settler-colonists felt

a Repugnance to submit to the Enforcement of regulations which, necessarily partaking much of the Nature of the rules applicable to a Penitentiary, interfere materially with the exercise of those rights which they enjoyed in this Country and to which as British Subjects they conceive themselves entitled in every part of His Majesty's Dominions.¹²⁷

In spite of the aspirations of voluntary emigrants, alterations to the administration of justice introduced by the *New South Wales Act* and Charter of Justice of 1823 continued to privilege penal imperatives. Indeed, the legislation was heavily influenced by the recommendations of Commissioner Bigge, who had been instructed that the 'Growth' of New South Wales and Van Diemen's Land 'as Colonies must be a Secondary Consideration'.¹²⁸

With the foundation of the Supreme Court in 1824, British subjects in Van Diemen's Land gained a 'physical and institutional site' in which to contest their constitutional inheritance.¹²⁹ At the opening sittings, the attorney-general praised trial by jury as 'One of the greatest boons conferred by the [imperial] Legislature upon this Colony', and 'the fundamental principle of the Charter [of Justice]' under which the court was established.¹³⁰ Within a week, however, he was expressing doubts about how trial by jury could operate.¹³¹ Section 6 of the *New South Wales Act* allowed for the trial of civil matters by the chief justice and two 'Assessors', or by a 'jury of twelve

¹²⁷ Earl Bathurst to Viscount Sidmouth, 23 April 1817, *HRA* I, X, p. 807.

¹²⁸ Bathurst to Bigge, 6 January 1819, *HRA* I, X, p. 4.

¹²⁹ Neal, *The Rule of Law in a Penal Colony*, pp. 63, 217-218.

¹³⁰ *Hobart Town Gazette*, 28 May 1824, p. 2; Charter of Justice, 13 October 1823.

¹³¹ Gellibrand to Arthur, 29 May 1824, *HRA* III, V, pp. 241-242; A.C. Castles, 'The judiciary and political questions: The first Australian experience, 1824-1825', *Adelaide Law Review* 5 (3) (1975), p. 306.

men', if both parties agreed.¹³² In criminal cases, section 4 provided for a panel of seven military or naval officers, nominated by the governor.¹³³ While it was referred to as a 'Jury' in the Act and in the popular press, this military panel was not a conventional jury of twelve 'neighbours and equals'.¹³⁴ As Pedder himself characterised the military panels, they were 'a mode of trial as unlike to Trial by Jury as can be conceived'.¹³⁵

Section 19 of the *New South Wales Act* became the focus of controversy for Chief Justice Pedder in 1825. This section provided for the 'summary' trial of non-capital offences 'committed by Felons or other Offenders transported to New South Wales, &c.' by magistrates in intermediate 'Courts of General or Quarter Sessions'.¹³⁶ Section 19 did not specify the mode of trial for free persons, however. Uncertain how to proceed, the magistrates launched a test case in order to determine 'whether the Justices in Sessions can, or cannot, try by a common Jury'.¹³⁷ In *R. v. Magistrates of Hobart Town* [1825], arguments about conflicting interpretations of section 19 were advanced by the attorney-general and solicitor-general. Attorney-General Gellibrand submitted that 'patent ambiguities' in the construction of the *New South Wales Act* meant that a specific executive or legislative response was required to introduce trial by jury for free persons in the Quarter Sessions.¹³⁸ Solicitor-General Stephen countered that, in spite of its ambiguities, the Act did not 'expressly take away Trial by Jury' and therefore 'the Common Law right still exist[ed]'.¹³⁹ Pedder was ultimately persuaded by Gellibrand's arguments, and ruled that the common-law right to trial by jury did not apply in Van Diemen's Land. As a result, there could be no trial by jury in the Quarter Sessions 'until His Majesty shall think fit to introduce it by an Order

¹³² 4 Geo. IV, c. 96, s. 6.

¹³³ 4 Geo. IV, c. 96, s. 4.

¹³⁴ Castles, 'The judiciary and political questions', p. 298.

¹³⁵ *R. v. Magistrates of Hobart Town* [1825].

¹³⁶ 4 Geo. IV, c. 96, s. 19.

¹³⁷ *R. v. Magistrates of Hobart Town* [1825].

¹³⁸ Castles, 'The judiciary and political questions', p. 306.

¹³⁹ *R. v. Magistrates of Hobart Town* [1825].

in Council'.¹⁴⁰

Pedder's decision has become controversial, not only because it frustrated local settler aspirations for the full enjoyment of their English liberties, but because it contradicted the decision of Chief Justice Forbes in a similar test case brought before the Supreme Court of New South Wales in October 1824.¹⁴¹ As Ian Holloway contends, popular and scholarly opinion has widely regarded Forbes' decision in *R. v. the Magistrates of Sydney* [1824] as 'the "right" judgment'.¹⁴² Within a nationalist constitutional history tradition, Forbes has also been praised for his 'judicial activism' in allowing an 'experiment' with trial by jury in the Quarter Sessions.¹⁴³ By contrast, Holloway observes, Pedder's 'reputation [has] never really recovered' from the critiques which ensued.¹⁴⁴ Marking him as a member of the 'government party',¹⁴⁵ Pedder's ruling has been critiqued on two fronts: statutory construction and constitutional implications.

Pedder's construction of the *New South Wales Act* earned him 'scathing reviews' in the emancipist press in Sydney.¹⁴⁶ In the reformist *Australian*, Sydney barrister and pressman, Dr Robert Wardell, ridiculed Pedder's 'extraordinary' decision as 'a syllogistic fallacy which any lawyer of six days standing at the Bar, or even a six dinner student, could, without profound

¹⁴⁰ *Hobart Town Gazette*, 23 July 1825, p. 3.

¹⁴¹ *R. v. the Magistrates of Sydney* [1824] NSWKR 3; [1824] NSWSupC 20, B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Division of Law Macquarie University), <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1824/supreme_court/r_v_the_magistrates_of_sydney/> accessed 1 January 2012.

¹⁴² Holloway, 'Sir Francis Forbes and the earliest Australian public law cases', p. 235; cf. David Neal's useful observation that judicial decisions can differ without being arbitrary, because the 'right' decision is determined structurally, rather than by reference to 'absolute truth'. Neal, *The Rule of Law in a Penal Colony*, p. 69.

¹⁴³ I. Baker, *Sorely Tried: Democracy and Trial by Jury in New South Wales. Francis Forbes Lectures 2002* (Sydney, Francis Forbes Society, 2002), p. 64.

¹⁴⁴ Holloway, 'Sir Francis Forbes and the earliest Australian public law cases', p. 235.

¹⁴⁵ P.A. Howell, 'Pedder, Sir John Lewes (1793-1859)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/pedder-sir-john-lewes-2542/text3457>> accessed 8 August 2011.

¹⁴⁶ Holloway, 'Sir Francis Forbes and the earliest Australian public law cases', p. 235.

reflection, remove'.¹⁴⁷ Repeating Wardell's assessment with evident relish, Pedder's judicial biographer reiterates his critique.¹⁴⁸ Measured against 'fundamental principles of statutory construction', Bennett argues, Pedder's judgement was 'misconceived'.¹⁴⁹

In striking contrast to the attacks on Pedder in the *Australian*, both the anti-government *Colonial Times* and officially sanctioned *Hobart Town Gazette* expressed 'admiration of the learning, patience, and integrity evinced by the Chief Justice' in his ruling.¹⁵⁰ 'It is not as to the Judge's decision that any complaints are made', the *Colonial Times* remarked a week before Wardell's commentary was published.¹⁵¹ 'On the very contrary', the local opposition newspaper editorialised, 'the whole Island is convinced that the Law as it stands, was most accurately interpreted'.¹⁵² Resonating with Hamburger's emphasis on a judge's duty to decide 'in accord with the law of the land', it was not Pedder's interpretation, but the law 'of which [people] complain'.¹⁵³ As the *Hobart Town Gazette* declared in the edition which printed Pedder's judgement, 'The recent Act of Parliament is most lamentably defective'.¹⁵⁴ Writing in the 1850s, colonial historian, John West, captured the essence of local reaction, when he observed that while Forbes' judgement was preferred as being 'more agreeable to Englishmen', Pedder's decision was a 'more correct interpretation of the *intentions* of [the imperial] parliament'.¹⁵⁵

A minute from Colonial Office counsel, James Stephen, dated 1 March 1828, confirms the imperial perspective on the 'correct' reading of section 19:

¹⁴⁷ *Australian*, 25 August 1825, p. 3; 1 September 1825, p. 2.

¹⁴⁸ Bennett, *Sir John Pedder*, p. 23.

¹⁴⁹ Bennett, *Sir John Pedder*, pp. 21-22, 24; but cf. Alex Castles proposes that the cases can be more meaningfully read for what they reveal about how courts deal with what are 'essentially political questions'. Castles, 'The judiciary and political questions', p. 312.

¹⁵⁰ *Colonial Times*, 19 August 1825, p. 2.

¹⁵¹ *Colonial Times*, 19 August 1825, p. 2.

¹⁵² *Colonial Times*, 19 August 1825, p. 2.

¹⁵³ Hamburger, *Law and Judicial Duty*, p. 17; *Colonial Times*, 19 August 1825, p. 2.

¹⁵⁴ *Hobart Town Gazette*, 22 July 1825, p. 2.

¹⁵⁵ West, *History of Tasmania*, p. 83. Editorial emphasis.

‘Whatever may be the construction of the words of this Clause’, Stephen advised the Secretary of State, Sir George Murray, ‘it is a matter admitting of no doubt that the *real intention* was to prevent Trial by Jury alike in all the legal Tribunals of the Colony’.¹⁵⁶ In a point later reiterated to Governor Arthur by Murray, Stephen observed that, ‘There can be no valid reason why the Criminal should be tried at the Quarter Sessions by a Jury, and at the Supreme Court by seven Military Officers’.¹⁵⁷ Whether guided by this ‘real intention’ or not,¹⁵⁸ Pedder eschewed Forbes’ ‘interventionist’ approach, and accepted the ‘authority of the lawmaker’ – here, the imperial parliament which had passed the *New South Wales Act*.¹⁵⁹ When succeeding legislation confirmed the continuing operation of the Supreme Courts in 1828, Pedder’s interpretation was further vindicated by the abolition of jury trial in the Quarter Sessions allowed by Forbes in New South Wales, until it was first established in the Supreme Court.¹⁶⁰

In contrast to Bennett’s assertion that the chief justice ‘saw no great public issues exposed’ by *R. v. Magistrates of Hobart Town*, Pedder’s private correspondence reveals that he was keenly aware of the ‘anxiety in the public mind upon the question’ of trial by jury.¹⁶¹ For this reason, the chief justice was careful to explain his decision as fully as possible. Having heard the arguments of Gellibrand and Stephen on 5 July 1825, Pedder reserved his

¹⁵⁶ 1 March 1828, CO 201/195, f. 343a, AJCP reel PRO 163. Editorial emphasis. Bennett cites Stephen’s minute, but disputes the validity of the Colonial Office’s interpretation of its own legislation. He similarly ignores Stephen’s opinion that an ‘extraordinary contradiction on the subject of Juries exists in the present New South Wales Act [1823], or at least has been attributed to it by Mr Forbes ... *in opposition to* the opinion of Mr Pedder’. Editorial emphasis. 1 March 1828, CO 201/195, ff. 343-343a, AJCP reel PRO 163; Bennett, *Sir John Pedder*, pp. 23-24.

¹⁵⁷ 1 March 1828, CO 201/195, f. 343a, AJCP reel PRO 163; Murray to Arthur, 31 July 1828, *HRA* III, VII, p. 455, in which Murray repeats Stephen’s advice that ‘no sufficient reason has been suggested’ why the ‘mode of trial’ should differ between the Supreme Court and the Quarter Sessions.

¹⁵⁸ Bennett, *Sir John Pedder*, p. 23, suggests that Pedder was not made aware of Stephen’s opinion.

¹⁵⁹ Hamburger, *Law and Judicial Duty*, p. 31; Castles, ‘The judiciary and political questions’, pp. 312-313.

¹⁶⁰ 9 Geo. IV, c. 83, the *Huskisson Act* (1828).

¹⁶¹ Bennett, *Sir John Pedder*, p. 20; Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273a, AJCP reel PRO 231.

decision 'in order', he explained, 'to give this subject the fullest consideration'.¹⁶² Before adjourning the court, however, the chief justice 'briefly' stated 'the impressions ... upon my mind'.¹⁶³ Summarising the arguments of Gellibrand and Stephen, he reiterated the key question raised by the case: did the common-law right to trial by jury exist, or had it been taken away by statute?

Unlike his usual *ex tempore* judgements, for which he kept few systematic notes,¹⁶⁴ Pedder took the additional step of furnishing a copy of his decision 'to the Printer of the Paper'.¹⁶⁵ Pedder's judgement was delivered on 12 July and published in the *Hobart Town Gazette* on 23 July.¹⁶⁶ In this carefully prepared ruling, the chief justice acknowledged the 'considerable diffidence' with which his decision was delivered, 'knowing as I do, what has been the opinion of others on the same point'.¹⁶⁷ Alluding to Forbes' determination, Pedder was clearly mindful of popular pressure for a similar decision in Van Diemen's Land. The chief justice nonetheless maintained the independence demanded by his oath of office. He was '*not at liberty* to adopt' the 'opinion of others', he reminded colonists.¹⁶⁸ Instead, Pedder obeyed what he described as '*my imperative duty* to form, in the best way I can, an opinion of my own on the question, and, having formed it, to deliver it'.¹⁶⁹

In contrast to his much-maligned 'strict constructionist' approach to the *New South Wales Act*,¹⁷⁰ Pedder's judgement in *R. v. Magistrates of Hobart Town* reveals that he was particularly concerned by the Act's broader intent. As

¹⁶² *Hobart Town Gazette*, 8 July 1825, p. 3.

¹⁶³ *Hobart Town Gazette*, 8 July 1825, p. 3.

¹⁶⁴ See, for example, Pedder to Arthur, 13 October 1825, AOT G039/1/1 Miscellaneous correspondence addressed principally to the Governor, f. 71; Bennett, *Sir John Pedder*, p. 134, endnote 59.

¹⁶⁵ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273, AJCP reel PRO 231.

¹⁶⁶ *Hobart Town Gazette*, 23 July 1825, pp. 2-3.

¹⁶⁷ *R. v. Magistrates of Hobart Town* [1825].

¹⁶⁸ *R. v. Magistrates of Hobart Town* [1825]. Editorial emphasis.

¹⁶⁹ *R. v. Magistrates of Hobart Town* [1825]. Editorial emphasis.

¹⁷⁰ Castles, 'The judiciary and political questions', p. 313.

Hamburger usefully elucidates the ‘two-tier’ common-law analysis of intent, a judge ‘began narrowly with “the words”, but when these were obscure [he] had to move to more general examination of “intent”’.¹⁷¹ Mirroring the ‘Christian trope of the letter and the spirit’, this was ‘not a narrowly literal inquiry’, Hamburger explains, ‘but rather a more abstract investigation, which drew upon the words and upon the intent of individual legislators’ to discern the ‘intent, sense, or meaning of the act attributable to its maker’ – in this case, the imperial parliament.¹⁷² Finding ambiguity within the words of the Act, Pedder looked to the intent of the legislators: this he identified, using the words of its long title, as securing the ‘better Administration of Justice’.¹⁷³ Further emphasising this guiding principle, Pedder quoted from the Act’s preamble: “‘Whereas it is expedient for the more effectual Administration of Justice;” – how large these words are!’¹⁷⁴

Two months after delivering his ruling, Pedder wrote privately to Robert Wilmot Horton at the Colonial Office. He annexed a printed copy of his judgement, which, he suggested, was ‘much too long, and too minute, but I thought it best to give the reasons very fully, and not to pass unnoticed any of the arguments which had been urged’ by Gellibrand and Stephen.¹⁷⁵ Pedder made no further comment on his decision, except to reiterate his statements from the bench: that while the question had received ‘a different determination’ in Sydney, his own ‘opinion ... on this subject was not hastily formed, and believing it to be right, I had no choice but to deliver it’.¹⁷⁶

Bennett infers from Pedder’s correspondence with Wilmot Horton that the judge’s private views on jury trial had ‘taint[ed]’ his judgement with

¹⁷¹ Hamburger, *Law and Judicial Duty*, p. 57.

¹⁷² Hamburger, *Law and Judicial Duty*, pp. 54, 57.

¹⁷³ *R. v. Magistrates of Hobart Town* [1825].

¹⁷⁴ *R. v. Magistrates of Hobart Town* [1825].

¹⁷⁵ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273, AJCP reel PRO 231.

¹⁷⁶ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273, AJCP reel PRO 231. Editorial emphasis.

‘extra-judicial considerations’.¹⁷⁷ It is certainly true that Pedder’s private concerns about extending trial by jury resonate with the ‘partisan’ objections repeated by Commissioner Bigge in his *Report on the Judicial Establishments* (1823) and identified by Bennett as those of the ‘exclusive’ faction in New South Wales.¹⁷⁸ They also reflected thinking at the Colonial Office. Like Bigge and Colonial Office counsel James Stephen,¹⁷⁹ Pedder expressed doubts about the impartiality of civilian jurors in a small community charged with ‘party feeling’.¹⁸⁰ In contrast to the tension between the ‘emancipist’ and ‘exclusive’ factions in New South Wales, however, he saw ‘not so much danger to be apprehended from the conflict of feelings between the convict and the free classes, as from the conflict of feelings between the political parties and private individuals’.¹⁸¹ Van Diemen’s Land, Pedder believed, was like many other ‘small communities’ in which ‘personal dislikes and jealousies’ were likely to be ‘carried into the Jury box’.¹⁸² While he was confident that ordinary criminal cases might be heard by a jury with ‘the least real danger’, Pedder suspected that the ‘effects of party and personal feelings would most likely be felt’ in contentious cases like ‘libel and assault’.¹⁸³

¹⁷⁷ Bennett, *Sir John Pedder*, pp. 22-23.

¹⁷⁸ cf. Bennett’s condemnation of Bigge for allowing himself to be used as a ‘tool of Government and partisan interests’ and for his ‘destructive influence’ in advising against the full introduction of trial by jury. J.M. Bennett, ‘The day of retribution: Commissioner Bigge’s inquiries in colonial New South Wales’, *The American Journal of Legal History* 15 (2) (1971), pp. 100, 105; and cf. Edgeworth’s helpful definition of the ‘quasi-feudal, quasi-military’ social structure embraced by the ‘exclusives’, in which the political sphere was dominated by the aristocratic element of society. Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 56.

¹⁷⁹ cf. Stephen’s harmonising view that, ‘The obvious objection to the introduction of Juries is, that in so small a society, split into so many factions ... there would be no chance of equal justice being done by any Juries which could be empanelled’. 1 March 1828, CO 201/195, f. 341, AJCP reel PRO 163.

¹⁸⁰ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273a, AJCP reel PRO 231.

¹⁸¹ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273a, AJCP reel PRO 231.

¹⁸² Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273a, AJCP reel PRO 231.

¹⁸³ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274, AJCP reel PRO 231; cf. Stephen’s opinion that ‘Every Law-Suit and almost every Criminal Trial would assume the character of a party-quarrel’. 1 March 1828, CO 201/195, f. 341, AJCP reel PRO 163.

Significantly, Pedder offered the ‘impression upon [his] mind upon the whole question’ in a section of his letter which is introduced with the key observation – omitted by Bennett – that Wilmot Horton would ‘naturally desire to know the opinions entertained here, as to the *safety* of introducing Trial by Jury’.¹⁸⁴ Having dealt with the legality of the question in court, Pedder made no further comment; instead, he used this private correspondence with Wilmot Horton to consider the introduction of civilian juries from the perspective of its potential impact on social and political stability, and a fair trial for prisoners.

From the bench, Pedder had acknowledged that, ‘In a Colony 20 years established, and containing 18 or 20,000 inhabitants, it must be presumed that there are enough qualified persons to establish Juries’.¹⁸⁵ Privately, however, he was concerned about the ‘capability of the Colony to furnish ... a sufficient number of persons, *properly qualified by sound moral feeling*, to serve as Jurymen’.¹⁸⁶ Pedder did not explicitly link the issue of jury qualification to his decision in *R. v. Magistrates of Hobart Town*, and his views on the practical operation of trial by jury did not form part of his judgment. These private concerns therefore provide a valuable insight into Pedder’s thinking around the social and political ‘safety’ of extending trial by jury in the colony, because under statute law jurors were selected on the basis of property, not moral, qualifications.

Resonating with his judicially expressed concern for the ‘better administration of justice’, Pedder regarded military juries as the most equitable mode of proceeding in the penal colony. No doubt reflecting his personal esteem for the officer class, the chief justice also drew on his own experience of military juries to assure Wilmot Horton that ‘I can most

¹⁸⁴ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 273a, AJCP reel PRO 231. Editorial emphasis. Bennett, *Sir John Pedder*, p. 22.

¹⁸⁵ *R. v. Magistrates of Hobart Town* [1825].

¹⁸⁶ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274, AJCP reel PRO 231. Editorial emphasis.

conscientiously bear testimony to the intelligence, the impartiality, and the unwearied attention, which our Military Juries have brought to the trial of every case'.¹⁸⁷ In contrast to the supporters of civilian juries, who pointed to the potential for interference with a jury of serving military officers nominated by a governor who was also their senior officer, Pedder believed that the military panels (including half-pay officers who had settled in the colony) remained the best option in the absence of a sufficient number of 'respectable Settlers'. Indeed, glossing over real or perceived conflicts of interest, Pedder confidently asserted that 'I am persuaded that it would be impossible, to select any body of Men, either in this, or in any other Country, in whom a Prisoner could so safely rely, for a fair trial of his case'.¹⁸⁸

It is possible to argue, with Bennett, that in 1825 – a little over a year into his first judicial appointment and conscious of his insecure tenure – Pedder might have allowed himself to be guided by Arthur's agenda. Significantly, however, the chief justice continued to express the same concerns around trial by jury. By 1834, Pedder was no longer the inexperienced 'young lawyer' chided by the *Australian* in 1825,¹⁸⁹ but he had not altered his position. On the jury question, he informed Arthur, 'I have long since made up my mind'.¹⁹⁰ In a letter dated 16 July 1834, Pedder responded to the governor's request for his opinion on the 'further extension of trial by Jury', as authorised by the *Huskisson Act* of 1828.¹⁹¹ Again differentiating between the legal and policy dimensions of the question, Pedder explained that it must be 'considered in two points of view – 1 as it merely effects the administration of Justice: [and] 2 as a measure of policy, and as it may affect

¹⁸⁷ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274a, AJCP reel PRO 231.

¹⁸⁸ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274a, AJCP reel PRO 231.

¹⁸⁹ Wardell editorialised that, 'A young lawyer can never be wrong in availing himself of the direction or assistance of useful guides' or deferring to those (meaning Forbes) 'who can boast of longer experience in the law'. *Australian*, 25 August 1825, p. 3.

¹⁹⁰ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

¹⁹¹ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

the peace and good government of the Colony'.¹⁹²

In framing his responses, Pedder was clear that he was wearing two different hats: those of a judge and a policy adviser.¹⁹³ In his judicial capacity Pedder declared that

as a Minister of Justice myself and not an inattentive observer of what passes under my eyes, I have no hesitation in saying that the trial by Jury cannot in my opinion be further introduced into the Colony without a total disregard of the just rights of his Majesty's government and those of a great many persons who in the present state of society ... can never hope for a fair trial.¹⁹⁴

As David Neal has observed in New South Wales, the law became the 'means of expressing and contesting ... differing conceptions of social and economic relations' in the colonial space.¹⁹⁵ Reflecting Pedder's monarchical world view,¹⁹⁶ his concerns for the 'just rights' of the government are consonant with his Tory affinity for an ordered social hierarchy, as well as conservative fears about threats to the peace and stability of society from reformist attacks on the government and its officials.

While Pedder was cautious about placing his views on the public record,¹⁹⁷ he was willing to explain his concern for the rights of 'a great many persons' who could 'never hope for a fair trial' by a Van Diemen's Land jury.¹⁹⁸ Pedder's concerns present a mirror image to those of the anti-Arthur camp: whereas press commentators feared government place-men and politically

¹⁹² Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

¹⁹³ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

¹⁹⁴ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170. Pedder here uses the term 'Minister of Justice' in its now obsolete sense of an 'officer entrusted with the administration of the law, or attached to a court of justice'. *OED*.

¹⁹⁵ Neal, *The Rule of Law in a Penal Colony*, p. 24.

¹⁹⁶ cf. conservatives like Pedder believed that emphasis on the monarchical and aristocratic elements of government would check dangerous democratic tendencies and 'prevent the natural tendency of political regimes to degenerate into their constitutional forms: tyranny, oligarchy and anarchy'. Fraser, 'All the privileges which Englishmen possess', pp. xxviii-xxix.

¹⁹⁷ He explained to Arthur that, 'It is difficult to state an opinion on this hand or more properly to illustrate one's reasons for it without entering into particulars which it is desirable not to mention in a public letter'. Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

¹⁹⁸ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

motivated libel prosecutions, the chief justice was alarmed that the fractious colonial community was 'continually excited by a press the most malignantly libellous that ever perhaps existed, and by artful wicked men'.¹⁹⁹ Given 'the present state of society', the chief justice reiterated his earlier concern for 'sound moral feeling' as the proper qualification for jury service.²⁰⁰ Implicitly contrasting the qualities of potential civilian jurors with the 'intelligence' and 'impartiality' of the officer class,²⁰¹ Pedder feared that, if civilian juries were more generally introduced, they would 'consist of men so low and ignorant and so uneducated that had they remained in their parent country there is hardly a possibility that they could have ever found their way into a jury box even tho [*sic*] their lives had been one continued course of industry and honesty'.²⁰²

From the second point of view, Pedder confessed to a 'cowardly and dishonest' inclination to limit himself to judicial considerations and thereby avoid giving an opinion on 'the policy of the matter'.²⁰³ Subjugating will to duty, Pedder went on to explain that he did not refer to the direct impact of the jury question on the administration of justice, but its effects on the community. Clarifying his meaning, he confirmed that 'when I say policy I sincerely mean the welfare of the people'.²⁰⁴ Recollecting that trial by jury was 'only one of the rights the withholding of which is complained of',²⁰⁵ Pedder argued that granting the concession might put an end to the pro-jury campaign, but would not produce 'the general peace and quiet of the community' in the longer term.²⁰⁶ Instead, he feared, allowing this one concession would 'probably have the effect of opening a still wider door to

¹⁹⁹ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁰⁰ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170; Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274a, AJCP reel PRO 231.

²⁰¹ Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 274a, AJCP reel PRO 231.

²⁰² Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁰³ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁰⁴ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁰⁵ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170. Original emphasis.

²⁰⁶ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

agitations and the evils which now divide society'.²⁰⁷

Pedder's dual perspectives on the jury question serve as a powerful reminder that the discourses of liberties could be deployed by liberals and conservatives for different ends. In contrast to the aspirational rhetoric of the jury activists, Pedder took a legalistic and pragmatic view of the potential impact of the further extension of jury trial on the administration of justice. With a monarchical, rather than democratic, view of government, Pedder was also concerned for the 'just rights' of the imperial parliament to determine the administration of justice in the colony through legislative and executive means. At the same time, he was anxious to protect the right of defendants to a fair trial. After nine years working with military juries, the chief justice remained convinced that they represented the most equitable option in a small community characterised by factionalism, and possessing a limited pool of 'sound' civilian jurors. In framing his response to the jury question, then, Pedder privileged two sets of rights: those of the government and those of the defendant. For the chief justice, these rights continued to outweigh the 'ancient' constitutional liberties claimed by the pro-jury settler activists.

6.3 Pedder and the repugnancy rule: nadir to apotheosis

In New South Wales and Van Diemen's Land, the chief justice was required to certify that proposed local legislation was not 'repugnant to ... the Laws of England, but consistent with such Laws so far as the Circumstances of the ... Colony will admit'.²⁰⁸ Under the *New South Wales Act* of 1823, legislation initiated by the governor was to be certified, *ex officio*, by the chief justice, before it was presented to, or passed by, the Legislative Council.²⁰⁹ With the passage of the *Huskisson Act* in 1828, the judge's responsibility for legislative supervision shifted from 'pre-emptive disallowance' to 'non-binding

²⁰⁷ Pedder to Arthur, 16 July 1834, Arthur Papers, vol. 10, ML ZA 2170.

²⁰⁸ 4 Geo. IV, c. 96, s. 29.

²⁰⁹ E. Campbell, 'Colonial legislation and the laws of England', *University of Tasmania Law Review* 2 (2) (1965), p. 155; Edgeworth, 'Defamation law and the emergence of a critical press', p. 52.

commentary’.²¹⁰ As Brendan Edgeworth argues, it ‘followed that any Governor would be very dependant on his Chief Justice for support in political as well as legal matters’.²¹¹ Conversely, settler activists and whiggish historical narratives assert that Pedder’s willingness to certify legislation under the repugnancy rule was a key test of his judicial independence from executive interference.

Pedder’s section-29 certification of newspaper licensing legislation in 1827 is central to his construction as a puppet of government. As with the jury question, Pedder diverged from Chief Justice Forbes, who declined to certify comparable legislation in New South Wales; where Forbes is generally praised for his liberal constitutional approach, Pedder’s conservative legalistic reading is condemned. Bennett is particularly critical, contrasting Forbes’ ‘high and eloquent expressions of principle’ with the ‘uncritical compliance, inexact legal knowledge, and willing subservience’ of Pedder.²¹²

As McLaren points out, freedom of the press was one of the most ‘contested and contingent’ liberties claimed by Englishmen.²¹³ Under English law, the press had been controlled through two key strategies since the early modern period: pre-publication censorship and post-publication prosecution. The eighteenth-century response had been characterised by an ‘emerging convention of no prior restraint’,²¹⁴ but, in the 1820s, the English press again faced severe restrictions under the *Six Acts* of 1819. In the wake of serious urban disturbances, including the Peterloo riots, the ‘notorious’ *Six Acts* regulated advertising, imposed stamp duty and licensed newspapers.²¹⁵ The *Six Acts* did not apply in New South Wales and Van Diemen’s Land, so that

²¹⁰ McLaren, *Dewigged, Bothered and Bewildered*, p. 158; Campbell, ‘Colonial legislation and the laws of England’, pp. 161-164; 9 Geo. IV, c. 83, s. 22.

²¹¹ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 52.

²¹² Bennett, *Sir John Pedder*, p. 61.

²¹³ McLaren, ‘The rule of law in British colonial societies’, p. 3.

²¹⁴ B. Wright, ‘Libel and the colonial administration of justice in Upper Canada and New South Wales, c. 1825-30’ in H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008), p. 18.

²¹⁵ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 52.

colonial pressmen initially enjoyed fewer restrictions than their counterparts in England. Specific restraints on the printers of the government *Gazettes* were removed by Governors Brisbane and Sorell in 1824,²¹⁶ and their gubernatorial successors, Darling and Arthur, followed a policy of non-interventionism until an increasing number of seditious and criminal libels prompted a response. Two potential strategies were available to them: common-law prosecutions and statutory regulation.

In the absence of specific colonial legislation, the common law provided for prosecutions for blasphemous, seditious and criminal libel, and for civil defamation. The two most relevant offences in the colonial context were seditious and criminal libel. As Edgeworth explains, seditious libel occurred when 'officials of the government, individually or collectively, were criticised in their official capacity by a member of the public and that such criticism had a tendency or was intended to incite sedition'.²¹⁷ The defence of truth was unavailable, and there 'need not be any defamatory element'.²¹⁸ As a result, seditious libel encompassed 'almost any criticism ... of a public official'.²¹⁹ Criminal libel, on the other hand, consisted in the 'publication of defamatory statements which were calculated, or had a tendency, to cause a breach of the peace'.²²⁰ Unlike the capital offence of treason, seditious and criminal libel prosecutions did not require proof of 'overt acts against the state'.²²¹

Libel trials heard in the Supreme Court of Van Diemen's Land during the mid-1820s illustrate how the strategy of common-law prosecution was deployed. In July 1825, emancipist newspaper proprietor, Andrew Bent, was prosecuted for 'composing, printing, and publishing ... false, scandalous, and

²¹⁶ cf. Bathurst to Arthur, 12 April 1826, *HRA* III, V, p. 130; L.C. Mickleborough, *William Sorell in Van Diemen's Land: Lieutenant-Governor, 1817-24: A Golden Age?* (Hobart, Blubber Head Press, 2004), pp. 117-118.

²¹⁷ Edgeworth, 'Defamation law and the emergence of a critical press', p. 61.

²¹⁸ Edgeworth, 'Defamation law and the emergence of a critical press', p. 61. Lord Campbell's *Libel Act* (1843) introduced the defence of truth.

²¹⁹ Edgeworth, 'Defamation law and the emergence of a critical press', p. 61.

²²⁰ Edgeworth, 'Defamation law and the emergence of a critical press', p. 62.

²²¹ Wright, 'Libel and the colonial administration of justice', p. 18.

malicious Libel[s] of and concerning Lieutenant Governor Arthur', in the *Hobart Town Gazette* on 8 October 1824 and 11 February 1825.²²² As the Attorney-General, J.T. Gellibrand, explained the charge, to accuse the lieutenant-governor of 'tyranny and oppression is a gross and wicked Libel'.²²³ In summing up, Pedder reminded the jury of the limits on the liberty of the press:

If a person fairly and temperately discusses public measures, he is entitled by the Law so to do. But if under cover of this, he imputes wicked, or malicious, or tyrannical motives, to an officer of such high rank as His Honor [*sic*] the Lieutenant Governor, it becomes a Libel.²²⁴

Accusing the chief justice of complicity in a 'blatant political show trial',²²⁵ Bennett disputes Pedder's 'illogical proposition' that governors should be incapable of corrupt or tyrannical motives.²²⁶ Illustrating the importance of clarifying the historical meaning of libel law, Edgeworth explains that, in cases of seditious and criminal libel, not only did the status of the libelled person occupy 'centre stage', but the 'relevant common law maxim was "the greater the truth, the greater the libel"'.²²⁷ As Pedder reiterated at Bent's retrial in August 1825, if a writer 'imputes corrupt or tyrannical motives to any Government, it is certainly a Libel, because it is impossible that any Government can exist, if the Governors are to be charged to be actuated by corrupt and tyrannical motives'.²²⁸

Comparative colonial histories demonstrate that legal controversies around government responses to political opposition and an independent press in

²²² R. v. Bent (No. 1) [1825], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_bent_1/> and R. v. Bent (No. 2) [1825], <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_bent_2/> accessed 1 January 2012.

²²³ R. v. Bent (No. 1) [1825].

²²⁴ R. v. Bent (No. 1) [1825].

²²⁵ Bennett, *Sir John Pedder*, p. 53.

²²⁶ Bennett, *Sir John Pedder*, p. 54.

²²⁷ Edgeworth, 'Defamation law and the emergence of a critical press', p. 55; citing J.F. Stephen, *A History of the Criminal Law of England*, Vol. II (London, Macmillan, 1883), p. 381.

²²⁸ R. v. Bent (No. 2) [1825].

the Canadian and Australian colonies highlight changing conceptions of legitimate power, as the emergence of a colonial ‘public sphere’ sought to create new sites for negotiating authority.²²⁹ As Edgeworth and Wright explain in the New South Wales context, at a time when the colonial Legislative Councils met under an oath of secrecy,²³⁰ ‘informed and politically engaged popular opinion’ – expressed through an opposition press – was not simply a challenge to the strong executive rule of particular governors.²³¹ More significantly, it embodied a shift from older understandings of ‘rulers-as-superiors’, who should not be criticised, to a ‘Lockean presumption of popular sovereignty’.²³² Within an embryonic colonial ‘public sphere’, the press no longer sought to address ‘a public ... as a collective recipient of obligations from above’ – as exemplified by the authorised government *Gazettes* – but also as a ‘joint-venturer in social affairs’.²³³

Pedder’s public and private statements reveal his adherence to the ‘ruler-as-superior’ paradigm. It informed his attitude to press attacks on the authority of the colonial governor, and he held these views consistently during the Arthur administration and beyond. As Edgeworth clarifies, conservatives, like Pedder, were ‘committed to a constitutional framework which criminalised public scrutiny of official behaviour per se’.²³⁴ Seditious and criminal libel constituted the ‘twin pillars of the “ruler-as-superior” form of constitutionalism’ – and, as James FitzJames Stephen explained in his *History of the Criminal Law of England* (1883), when a ruler is regarded as the superior of the subject, it ‘must necessarily follow that it is wrong to censure

²²⁹ Edgeworth, ‘Defamation law and the emergence of a critical press’, pp. 57-58; and Habermas’ seminal text, J. Habermas (trans. T. Burger and F. Lawrence), *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Polity Press, 1989).

²³⁰ 4 Geo. IV, c. 96, s. 32.

²³¹ Wright, ‘Libel and the colonial administration of justice’, p. 19.

²³² Edgeworth, ‘Defamation law and the emergence of a critical press’, pp. 56-57; Wright, ‘Libel and the colonial administration of justice’, p. 19.

²³³ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 60.

²³⁴ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 55. Edgeworth examples Pedder’s conservative Sydney connections, Saxe Bannister and the Macarthurs.

him openly'.²³⁵

As Pedder's later comments indicate, he recognised degrees of danger in public scrutiny. Advising Arthur against a libel prosecution in 1834, for example, the chief justice noted that a recent attack on an official was 'certainly ... an audacious libel, and its continuation evinces great malignity'.²³⁶ But, he conceded, the 'publication partakes rather of the nature of an impudent squib than ... a grave attack in which the Government is called to interfere for the protection of its officer'.²³⁷ At the other end of the spectrum, Pedder's statements evince characteristic conservative anxiety about public attacks on the government. During the trial of Gilbert Robertson for libelling Arthur and other government officials in his *True Colonist* in 1835, for example, Pedder vividly evoked the French Revolution in his address to the prisoner:

You set yourself up as a self-elected commentator upon the conduct of public officers, and how do you do it? You establish a system of terror? I do not know what to compare your paper to, it is an engine which I can only compare to that fearful one used in other times in another country, the guillotine.²³⁸

Continuing the analogy, Pedder likened Robertson to Robespierre's *Terroristes*, who sought to 'entirely eradicate the then existing government, by the decapitation of the men who framed and upheld it'.²³⁹

Pedder's commitment to the 'ruler-as-superior' paradigm no doubt informed his attitude to the legislative strategy deployed against the opposition press. It does not follow, however, that he abrogated judicial independence and acted in subservience to the governor's dictates. With the failure of

²³⁵ Edgeworth, 'Defamation law and the emergence of a critical press', p. 56, citing Stephen, *A History of the Criminal Law of England*, p. 299.

²³⁶ Pedder to Arthur, 9 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²³⁷ Pedder to Arthur, 9 December 1834, Arthur Papers, vol. 10, ML ZA 2170.

²³⁸ R. v. Robertson (No. 1) [1835], *Decisions of the Nineteenth Century Tasmanian Superior Courts*,

<http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1835/r_v_robertson_no_1_1835/> accessed 1 January 2012.

²³⁹ R. v. Robertson (No. 1) [1835].

common-law prosecutions to halt libels by Bent and others – who continued to publish them from Hobart Town Gaol – Governor Arthur introduced the ‘tried and tested’ legislative strategy of licensing and stamp acts.²⁴⁰ Pedder’s relationship to the *Newspaper Licensing Acts* of 1827 was twofold: he drafted the legislation, and certified it under section 29.²⁴¹ While conceding that the chief justice did not always grant certification ‘as a matter of form’, Bennett suggests that in this case Pedder certified the legislation ‘perfunctorily’ and ‘from ignorance [of the law], from an excessive zeal to accommodate Arthur’s wishes, or from a combination of the two’.²⁴²

Tracing the effect of the repugnancy doctrine on colonial legislation, Enid Campbell observed that one its ‘most serious shortcomings ... was that it admitted of both wide and narrow interpretations and placed in the judiciary so wide a discretion that in practice it was extremely difficult to predict whether legislation would pass muster or not’.²⁴³ On statutory regulation of the press, Edgeworth contends that Chief Justice Forbes ‘construed the common law of criminal and seditious libel narrowly’ and the ‘repugnancy doctrine broadly’.²⁴⁴ Forbes’ refusal to certify legislation for New South Wales, essentially replicating that certified by Pedder in Van Diemen’s Land, was, Edgeworth argues, ‘based on a very generous reading of the law of England at the time’.²⁴⁵ Given the ‘draconian restrictions’ imposed on the English press under the *Six Acts* of 1819, Forbes’ *Newspaper Acts Opinion* represents ‘rather more than a dispassionate statutory interpretation’, he concludes.²⁴⁶ Bruce Kercher similarly argues that Forbes’ ‘appeal to

²⁴⁰ While the legislation was later disallowed, the Colonial Office confirmed that Arthur had acted in accordance with previous instructions in proposing it. Bathurst to Arthur, 2 April 1826, *HRA* III, V, pp. 130-131; Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 66.

²⁴¹ 8 Geo. IV No. 2, *An Act to regulate the printing and publishing of newspapers*, and 8 Geo. IV No. 3, *An Act imposing a stamp duty upon newspapers*; Bennett, *Sir John Pedder*, p. 56.

²⁴² Bennett, *Sir John Pedder*, p. 57.

²⁴³ Campbell, ‘Colonial legislation and the laws of England’, p. 164.

²⁴⁴ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 81.

²⁴⁵ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 67.

²⁴⁶ Edgeworth, ‘Defamation law and the emergence of a critical press’, p. 67; *Newspaper Acts Opinion* [1827] NSWKR 3; [1827] NSWSupC 23, *Decisions of the Superior Courts of New South Wales, 1788-1899*,

constitutional verities was ... a political rather than a legal decision'.²⁴⁷

Critically interrogating the 'liberal positivist' assumption that the 'purpose of the rule of law is to constrain the exercise of arbitrary power',²⁴⁸ Ian Holloway, Simon Bronitt and John Williams offer a useful alternative frame for reading the divergent conclusions of Pedder and Forbes. In their argument, the *New South Wales Act* of 1823 'implicitly facilitated a shift' from logical reasoning to a 'rhetorical style of reasoning' for determining the applicability of colonial law.²⁴⁹ Where the Blackstonian reception formula required judges to consider the colony's 'intrinsic nature' as a penal colony and then 'engage in a process of logical reasoning to determine which laws were "applicable to ... the condition of an infant colony"',²⁵⁰ rhetorical reasoning, they explain, involves a 'process of association', which asks whether something can be 'understood ... by its relation to something else'.²⁵¹ Reasoning in this mode directed judges towards considering the colony as 'an offshoot of the British polity in the British Isles'.²⁵² Under the 'double-headed repugnancy requirement' of the *New South Wales Act*,²⁵³ judges could now ask whether a proposed law was '*consistent with the laws of England*' as well as '*applicable to the condition of the colony*'.

Holloway *et al* argue that Forbes 'chose' not to look to New South Wales' status as a penal colony, as the Blackstonian formula would have required.²⁵⁴ Instead, he engaged, in a lengthy response, in 'an act of comparison, which

<http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/newspaper_acts_opinion/> accessed 1 January 2012.

²⁴⁷ B. Kercher, *An Unruly Child: A History of Law in Australia* (Sydney, Allen & Unwin, 1995), pp. 85-86.

²⁴⁸ I. Holloway, S. Bronitt, and J. Williams, 'Rhetoric, reason and the rule of law in early colonial New South Wales' in H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008), pp. 78-79.

²⁴⁹ Holloway, Bronitt, and Williams, 'Rhetoric, reason, and the rule of law', p. 91.

²⁵⁰ Holloway, Bronitt, and Williams, 'Rhetoric, reason, and the rule of law', p. 91.

²⁵¹ Holloway, Bronitt, and Williams, 'Rhetoric, reason, and the rule of law', p. 92.

²⁵² Holloway, Bronitt, and Williams, 'Rhetoric, reason, and the rule of law', p. 92.

²⁵³ Holloway, Bronitt, and Williams, 'Rhetoric, reason, and the rule of law', p. 92.

²⁵⁴ Holloway, Bronitt, and Williams, 'Rhetoric, reason and the rule of law', pp. 79, 92-93.

allowed him to say that [free] Englishmen in New South Wales should enjoy the same rights as Englishmen in England'.²⁵⁵ Unlike Forbes, Pedder did not provide written reasons for his decision to certify the Van Diemen's Land newspaper licensing Acts,²⁵⁶ and his certification is necessarily glossed by Holloway *et al.* Their conclusion about Forbes' mode of reasoning, however, usefully points to a more nuanced interpretation of Pedder's (unrecorded) reasons for granting certification. The 'distinction' between the two judges, they argue, is that Forbes acted 'like a judicial officer schooled in constitutionalism'.²⁵⁷ In view of Bennett's assertion that Forbes was responding to 'a dry point of law',²⁵⁸ their argument is significant.

Bennett's critique of Pedder's decision to certify centres on his claim that the chief justice was directed to 'answering the wrong question'.²⁵⁹ To support this argument, he emphasises that the 'prolix preamble' of the Van Diemen's Land legislation contained 'five lengthy recitals' that were 'intended to engage with the phrase "so far as the Circumstances of the Colony will admit" in s. 29' of the *New South Wales Act*.²⁶⁰ Then, in what Bennett sees as an 'unrelated tack', the preamble 'suddenly' engaged with the need to regulate newspapers that were 'calculated to diminish the Due Authority of the Government over ... transported Offenders, and over other His Majesty's Subjects here resident'.²⁶¹ In the absence of Pedder's written reasons, Arthur's report to the Colonial Office confirms that the chief justice adopted the Blackstonian reception formula in determining whether to certify. As

²⁵⁵ Holloway, Bronitt, and Williams, 'Rhetoric, reason and the rule of law', p. 94; Newspaper Act Opinion [1827] NSWKR 3; [1827] NSWSupC 23.

²⁵⁶ There was no obligation on the judges to do so, and Forbes' lengthy explanation 'exceeded the literal requirements' of the Act. Bennett, *Sir John Pedder*, p. 59.

²⁵⁷ Holloway, Bronitt, and Williams, 'Rhetoric, reason, and the rule of law', p. 98.

²⁵⁸ J.M. Bennett, *Lives of the Australian Chief Justices. Sir Francis Forbes: First Chief Justice of New South Wales, 1823-1837* (Sydney, The Federation Press, 2001), p. 89.

²⁵⁹ Bennett, *Sir John Pedder*, p. 58.

²⁶⁰ Bennett, *Sir John Pedder*, p. 58. For the preamble to 8 Geo. IV No. 2, see *HRA* III, VI, pp. 856-857.

²⁶¹ Bennett, *Sir John Pedder*, p. 58. Bennett omits a key phrase from the preamble – 'and tending to bring the Government as by Law established in to Public hatred and contempt' – that is, making the government the subject of blasphemous and seditious libel. *HRA* III, VI, p. 857.

Arthur told Lord Bathurst, 'The *condition of the Colony* ... thus set forth in the Act, removes completely, in the opinion of the Judge, every objection which has been raised against the legality of subjecting the publishing of newspapers to a licence resumeable [*sic*] at pleasure'.²⁶² In contrast to Bennett's reading, Arthur's report indicates that the chief justice did not automatically certify. Instead, he considered 'every objection' to the act's legality, but ultimately subordinated these doubts to what he reasoned to be the overriding Blackstonian dictum concerning the 'condition of the Colony'.

The later disallowance of the Van Diemen's Land newspaper legislation suggests that Pedder's logical reasoning was out of step with developments in other British colonies.²⁶³ It resonates, however, with an earlier judicial decision that was confirmed by the Colonial Office. In *R. v. Magistrates of Hobart Town* [1825] Pedder had unambiguously articulated his judicial view that Van Diemen's Land was a 'colony by settlement', in which the law was 'strictly English'.²⁶⁴ Adopting Blackstone's well-known caveat, he also clearly explained that colonists 'carry with them only so much of the English law, as *is applicable to their own situation and the condition of an infant colony*'.²⁶⁵ Indeed, in sentencing Andrew Bent for common-law libel in 1825 – before colonial legislative regulation was proposed – Pedder clearly emphasised his Blackstonian reasoning, telling the defendant that, 'If libels upon the Government are considered highly criminal in England, how much more so must all such be *in a Colony constituted as is this*, at such a distance from the Parent State'.²⁶⁶

Through the lens of the Blackstonian reception formula and Hamburger's 'two-tier' analysis of intent, Pedder's reading of the preamble of the

²⁶² Arthur to Bathurst, 24 September 1827, *HRA* III, VI, p. 248. Editorial emphasis.

²⁶³ cf. the recent 'Bombay decision' which, Forbes declared, was 'in the very teeth of Mr Pedder's opinion. Forbes to Wilmot Horton, 27 May 1827, in J.M. Bennett (ed.), *Some Papers of Sir Francis Forbes: The First Chief Justice in Australia* (Sydney, Parliament of New South Wales, 1998), p. 162; Bennett, *Sir John Pedder*, p. 59.

²⁶⁴ *R. v. Magistrates of Hobart Town* [1825].

²⁶⁵ *R. v. Magistrates of Hobart Town* [1825]. Editorial emphasis.

²⁶⁶ *R. v. Bent* (No. 2) [1825].

Newspaper Licensing Act was clearly directed towards answering a particular type of question. That it was not the constitutional question favoured by Forbes indicates that Pedder continued to reason logically rather than rhetorically, but does not prove that his judicial independence was compromised.

Twenty years later, Chief Justice Pedder was redeemed in the eyes of the settler press by his determined stance against gubernatorial encroachment on his judicial independence. Having certified a local act for the licensing of dogs in 1846, Pedder was subsequently persuaded, in a test case, that the Act was repugnant.²⁶⁷ Pedder initially understood the *Dog Act* (1846) as a remedy for a specific nuisance, but he and Mr Justice Montagu were convinced by counsel's arguments that dog licensing fees in fact imposed a tax that was not authorised under the terms of the *Huskisson Act* of 1828.²⁶⁸ Their ruling in *Symons. v. Morgan* [1847] thus set a precedent which threatened the colonial revenue, as many other local acts were now open to potential legal challenge. In the so-called 'Judge Storm' which ensued, Pedder's puisne judge, Algernon Montagu, was removed from office, and Pedder potentially faced the same fate. Governor William Denison instituted an inquiry in the Executive Council, in which the chief justice was charged with 'neglect of duty in having failed to certify against' the *Dog Act* 'on the ground of repugnancy, within the [fourteen-day] period prescribed by law for that purpose'.²⁶⁹ Denison also pressured Pedder to take eighteen months' leave of absence while the matter was referred to the Colonial Office.

²⁶⁷ For detailed accounts of the 'Judge Storm', see E. Campbell, 'Colonial legislation and the laws of England', *University of Tasmania Law Review* 2 (2) (1965), pp. 162-164; P.A. Howell, 'The Van Diemen's Land Judge Storm', *University of Tasmania Law Review* 2 (3) (1966), pp. 253-269; S. Petrow, 'Moving in an "eccentric orbit": The independence of Judge Algernon Sidney Montagu in Van Diemen's Land, 1833-47' in H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008), pp. 171-174. See also Robson, *A History of Tasmania*, pp. 471-473; and West, *History of Tasmania*, pp. 201-204.

²⁶⁸ *Dog Act*, 10 Vic. No. 5. And see 9 Geo. IV, c. 83, s. 25, which prohibited 'any Tax or Levy, except only such as it may be necessary to levy for [specific] local purposes'. The dog tax was going into the general revenue.

²⁶⁹ Pedder to Denison, 20 January 1848, CO 280/224, f. 214, AJCP reel PRO 562.

Encapsulating the tone of conventional historical accounts which present the episode as Pedder's apotheosis, Carrel Inglis Clark declared in 1922 that, 'Pedder appears, in his refusal [to take leave of absence] and his readiness to meet and answer any charges Denison might prefer against him, fearless, independent and pure, while a dark stain descends upon Denison's otherwise generally wholesome conduct as an administrator'.²⁷⁰ Writing in 2003, Bennett similarly reads Denison's actions as striking at 'the very root of judicial independence and the integrity of his office': Pedder's resistance confirmed that he was now 'at the height of his judicial powers'.²⁷¹

Rather than retracing the minutiae of the 'Judge Storm' or analysing the 'questions of very great legal and constitutional importance' raised by *Symons v. Morgan*,²⁷² this final section briefly illustrates how Pedder's defence against the charge of 'neglect of duty' offers a valuable articulation of his own conception of judicial independence and judicial duty. An attentive reading of the archival record also reveals that – in language which harmonises strikingly with his own – the Colonial Office's vindication of Pedder's conduct emphasises imperial concerns around the chief justice's vital role in securing stable governance.²⁷³

Reprimanding Sir William Denison in June 1848 for 'unjustifiable' conduct towards a judge, which was 'calculated to produce a more serious mischief as regards the community', the Secretary of State for the Colonies summarised his reading of the wake of *Symons v. Morgan*.²⁷⁴ Denison sought to suspend Pedder for 'neglect of duty in not having certified that illegality which he was

²⁷⁰ 'Denison, Montagu and Pedder: The Judge Storm' in R. Ely (ed.), *Carrel Inglis Clark: The Supreme Court of Tasmania. Its First Century* (Hobart, University of Tasmania Law Press, 1995), p. 43; and cf. West's comparable interpretation that, 'Among the blessings which the British constitution bestows, foremost of all is the freedom of the judgment-seat; and few political faults are less capable of palliation than a deliberate attempt to subject a judge to the influence of the executive'. West, *History of Tasmania*, p. 204.

²⁷¹ Bennett, *Sir John Pedder*, p. 99.

²⁷² Robson, *A History of Tasmania*, p. 471.

²⁷³ Earl Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 151a, AJCP reel PRO 562.

²⁷⁴ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 150, AJCP reel PRO 562.

afterward *compelled* by argument to acknowledge'.²⁷⁵ In order to appoint 'a Judge of different views', the chief justice was 'recommended, under a tolerably distinct threat of suspension, to take eighteen months' leave of absence from his post'.²⁷⁶ As Pedder himself succinctly summed up: 'The position in which I find myself is ... this: I am condemned; [...] Sentence is ready to be pronounced, and I may avoid the public pronouncement of it, by accepting the leave of absence proposed'.²⁷⁷

As Pedder explained to Denison in January 1848, the governor's proposal to take leave read like 'an invitation to me to plead guilty' without 'knowing precisely what I had pleaded guilty to'.²⁷⁸ At the Colonial Office, Lord Grey agreed that Pedder 'properly declined': to accept Denison's proposal, he argued, 'would have been to prejudice his own self-respect by acknowledging an error where he was conscious of none'.²⁷⁹ More seriously, Grey reasoned, 'to accept [leave] in order that [another] Judge ... should be substituted for himself, would have been a breach of [Pedder's] duty to the community'.²⁸⁰ As Grey explained, a judge's 'exposition of the law on a point duly submitted to him must not be questioned, save only by the Appellate Tribunal above him, and this, *not for his sake, but that suitors may have confidence in the Courts which adjudicate their rights*'.²⁸¹

From Pedder's perspective, his refusal to take the proposed leave also illuminates his understanding of the protection of his office from executive oversight. Referencing previous Colonial Office investigations into his conduct in the Gellibrand and Bryan cases, Pedder explained to the Colonial Secretary, James Bicheno, that

²⁷⁵ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 149, AJCP reel PRO 562. Editorial emphasis.

²⁷⁶ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 149, AJCP reel PRO 562.

²⁷⁷ Pedder to Denison, 6 January 1848, CO 280/224, f. 182, AJCP reel PRO 562.

²⁷⁸ Pedder to Denison, 6 January 1848, CO 280/224, f. 182a, AJCP reel PRO 562.

²⁷⁹ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 149a, AJCP reel PRO 562.

²⁸⁰ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 149a, AJCP reel PRO 562.

²⁸¹ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 152a, AJCP reel PRO 562. Editorial emphasis.

on more than one occasion the Secretary of State has thought to disallow on behalf of the Executive Government, their right and competency to review my Judicial proceedings, or to express any opinion on their accuracy; and on one of these occasions he considered an explanation I had entered into of my conduct as a waiver of the undoubted privileges of my office.²⁸²

Mindful that acquiescing to Denison's intrusions could be read as another 'waiver', Pedder explained to the governor that, by admitting an error, he should 'be precluded from urging that, to call a Judge in question for a judgement given by him honestly and conscientiously, to best of his ability, was a violation of his independence'.²⁸³ The act of forming a new opinion on the bench, after hearing the arguments of counsel, Pedder subsequently argued, did not undermine the honesty and conscientiousness of his original position. 'Does a Judge ... undertake for infallibility?', he asked rhetorically, 'or is more to be expected of a Colonial Judge than of those eminent persons who constitute the Courts of law in Westminster Hall?'²⁸⁴ Emphasising his point – and the dictates of judicial duty – Pedder continued, 'Has no one of these great Magistrates been ever heard to admit that after argument, he has *felt himself compelled* to give up opinions long before entertained?'²⁸⁵ Reiterating Pedder's point, the Colonial Office agreed that a changed interpretation of the law was not evidence of negligence. As Lord Grey opined, 'If it be neglect of duty on the part of a Judge to omit to certify the existence of defects in an Enactment which nevertheless are afterwards found to exist, it is difficult to see how the ablest and most conscientious lawyer can escape from such a charge'.²⁸⁶ It was, after all, a 'matter of familiar observation in the profession, that the faults and inaccuracies of a document are very rarely detected except by the attentive examination of hostile parties'.²⁸⁷

²⁸² Pedder to the Colonial Secretary [Bicheno], 5 January 1848, CO 280/224, f. 181a, AJCP reel PRO 562.

²⁸³ Pedder to Denison, 6 January 1848, CO 280/224, f. 183, AJCP reel PRO 562.

²⁸⁴ Pedder to Denison, 20 January 1848, CO 280/224, f. 221a, AJCP reel PRO 562.

²⁸⁵ Pedder to Denison, 20 January 1848, CO 280/224, ff. 221a-222, AJCP reel PRO 562.

²⁸⁶ Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 150, AJCP reel PRO 562.

²⁸⁷ Grey to Denison, confidential, 30 June 1848, CO 280/224, ff. 150-150a, AJCP reel PRO 562.

For Pedder, resisting Denison's attack on his judicial integrity and independence was also a matter of personal honour. As the chief justice explained, he was '*bound by every tie of duty* to himself, his office, and the Sovereign, whose commission he holds, to resist' interference 'to the utmost of his power'.²⁸⁸ Pedder's undiminished sense of the solemn and binding character of the oaths of office and allegiance he had sworn in 1824 prevented him from vacating his office at the governor's behest: 'I am ... *compelled* to decline to accept it', he told Denison.²⁸⁹ Echoing an earlier comment from the bench, in which Pedder had observed that 'both he and [the jury] had a duty to perform, and from which they could not depart without an *utter abandonment of their oaths*',²⁹⁰ the chief justice explained that, by agreeing to take leave, he should be 'forever after disgraced, and *ipso facto* render [himself] unworthy of holding the lowest office or employment which it is in Her Majesty's power to bestow on a subject'.²⁹¹

Hamburger's emphasis on the imperative to subjugate will to duty clarifies a final aspect of Pedder's response to the Judge Storm: his capacity to prioritise public service. As Lord Grey acknowledged, Denison had 'fairly and honourably borne testimony to the character of Sir John Pedder and stated that "not a word has been uttered against his honour or the uprightness of his conduct"'.²⁹² For the sake of stable governance in Van Diemen's Land, Grey was relying on Pedder to 'shew [*sic*] that he adds a temperate discretion, and a readiness to forget his own personal feelings when the Public Service is concerned'.²⁹³ 'Much, no doubt, will depend on the course which Sir John Pedder may take', he cautioned.²⁹⁴ The independence of the judiciary had

²⁸⁸ Pedder to Denison, 6 January 1848, CO 280/224, f. 183, AJCP reel PRO 562. Editorial emphasis.

²⁸⁹ Pedder to Denison, 6 January 1848, CO 280/224, f. 183, AJCP reel PRO 562. Editorial emphasis.

²⁹⁰ R. v. Gregson [1832], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1832/r_v_gregson/> accessed 1 January 2012. Editorial emphasis.

²⁹¹ Pedder to Denison, 6 January 1848, CO 280/224, f. 183, AJCP reel PRO 562.

²⁹² Grey to Denison, confidential, 30 June 1848, CO 280/224, f. 152, AJCP reel PRO 562.

²⁹³ Grey to Denison, confidential, 30 June 1848, CO 280/224, ff. 152-152a, AJCP reel PRO 562.

²⁹⁴ Grey to Denison, confidential, 30 June 1848, CO 280/224, ff. 151a-152, AJCP reel PRO 562.

been ‘menaced’ by the executive government, and it would be ‘difficult to restore in the Public mind the necessary confidence in the former, or respect for the latter’.²⁹⁵ Success would be determined by how willingly Pedder would co-operate – ‘as far as his own Legal convictions will allow’ – in ‘assisting’ the colonial government ‘out of the present embarrassment’.²⁹⁶

In contrast, then, to accounts which focus on Pedder’s heroic defence of judicial independence – and with it, settler liberties – a close reading of Pedder’s language highlights his focus on duty to his judicial office. Bound by the solemn oaths he had sworn on entering the chief justiceship, Pedder was compelled to assert his ‘internal’ independence. Again dominated by the language of duty, Pedder’s comments reveal that his sense of honour and judicial obligation were tightly bound, and closely mirrored the Baconian conceptions of his office articulated by the Colonial Office.

Conclusions

As John McLaren’s comparative studies demonstrate, colonial judges were appointed ‘at pleasure’ during the nineteenth century, and routinely served in the executive and legislative branches of government. Expected to adhere to a Baconian conception of loyal service to the Crown, their capacity to negotiate competing obligations was central to maintaining stable governance in the colonies. Pedder’s construction as a puppet of government hangs on the Diceyan rubric of separation of powers, which frames judicial independence in terms of formal protections from ‘external’ interference. Following Philip Hamburger, this chapter emphasises the ‘internal’ independence demanded by older common-law ideals of judicial duty, which not only required a judge to resist external influences, but also subjugate personal will to the duties of his office. An attentive reading of Pedder’s statements reveals that he firmly and consistently deployed the language of duty to justify his decisions and official conduct. By contrast, conventional

²⁹⁵ Grey to Denison, confidential, 30 June 1848, CO 280/224, ff. 151a-152, AJCP reel PRO 562.

²⁹⁶ Grey to Denison, confidential, 30 June 1848, CO 280/224, ff. 151a-152, AJCP reel PRO 562.

interpretations of his intersecting roles explicitly invoke the language of submission.

Pedder's conservative and legalistic conception of the rule of law has been contrasted unfavourably with the liberal constitutional attitude of Chief Justice Forbes. As the work of Holloway, Bronitt and Williams indicates, however, a clearer understanding of their divergent modes of legal reasoning points to a more nuanced reading of the differences between the two judges. Where Forbes reasoned rhetorically and appealed to ancient constitutional liberties, Pedder reasoned logically and privileged a Blackstonian focus on the 'condition' of the penal colony. Pedder arrived at different answers to differently focussed legal questions, and favoured political and social stability over the aspirations of free settler activists. It does not follow that his judicial independence was compromised.

Politically and professionally conservative, Pedder readily internalised a Baconian conception of his judicial obligations. Weathering several investigations into his official conduct, and gubernatorial pressure to vacate his office, Pedder retained the support of the Colonial Office and remained on the bench for thirty years. Knighted midway through his career, Pedder valued this 'high' honour as both a personal vindication and public recognition of loyal service to his office and his sovereign.

PART III

A CHAMPION OF THE ABORIGINAL PEOPLE?

Between 1823 and 1831, the Indigenous peoples of Van Diemen's Land resisted colonisation in a sporadic guerrilla conflict known to settlers and historians as the Black War.¹ In response, the colonial administration pursued two policies: criminalisation and spatial separation. During the mid-1820s, Indigenous resistance was constructed as felony or civil disturbance. By the late 1820s, however, the colonial government increasingly recognised that Indigenous people were engaged in a 'species of warfare' with the settlers,² and the policy response shifted from criminalisation to spatial separation. Through a series of proclamations and military operations, the government attempted to expel Indigenous people from the 'settled districts' of the island by force. By the early 1830s, however, both sides recognised the need for a negotiated settlement. Through the so-called 'Friendly Mission', government agent, George Augustus Robinson, 'induced' Indigenous survivors of the Black War to agree to expatriation from the main island of Van Diemen's Land.

As chief justice and Executive Councillor, Pedder played a decisive role at key moments in the Black War. In the Supreme Court in 1824, he established a Van Diemen's Land precedent by facilitating the trial and execution of two

¹ In the nineteenth century, colonial historians often referred to the Black Line operation of 1830 as the 'Black War'. Modern scholarship treats the Black War as encompassing three distinct phases: the first, from the killings of stock-keepers, William Holyoake and Mammoa, at Grindstone Bay in November 1823; the second, from the Government Notice of 29 November 1826 until the proclamation of martial law on 1 November 1828; and the third, from the proclamation of martial law until the end of the Black Line operation in 1830. G. Mackaness (ed.), Henry Melville, *The History of Van Diemen's Land from the Year 1824 to 1835 inclusive, During the Administration of Lieutenant-Governor George Arthur* (Sydney, Horwitz, 1965; originally published London, Smith and Elder, 1835), p. 90; A.G.L. Shaw (ed.), John West, *The History of Tasmania* (Sydney, Angus and Robertson, 1981; originally published Launceston, Henry Dowling, 1852), p. 286; L. Ryan, 'Massacre in the Black War in Tasmania, 1823-34: A case study of the Meander River region, June 1827', *Journal of Genocide Research* 10 (4) (2008), p. 483.

² George Arthur to [Secretary of State for the Colonies] Sir George Murray, 12 September 1829, *HRA* I, XIV, p. 446.

Indigenous men charged with aiding and abetting the murder of stock-keepers at the colonial frontier. In the Executive Council in 1828, he approved the forcible expulsion of Indigenous people from the 'settled districts', and the proclamation of martial law. Conventional historiography largely disregards Pedder's judicial engagement with settler-indigenous conflict, and focuses instead his redemptive 'protest' against the 'genocidal' policy of exiling Indigenous survivors to the islands of Bass Strait. Recorded in the Executive Council minutes of meeting for 23 February 1831, Pedder's apprehension that Indigenous exiles would 'soon begin to pine away when they found their situation one of hopeless imprisonment' was interpreted in 1870 by colonial historian James Bonwick as a protest against 'an unchristian attempt to destroy the whole race'.³ Bonwick's gloss is central to Pedder's reputation as a champion of the Aboriginal people of Van Diemen's Land, and continues to be cited by secondary sources in preference to Pedder's own, more nuanced remarks to the Executive Council.

Part III critically examines Pedder's judicial practice and extra-curial statements to test and contextualise the benevolent construction fostered by Bonwick. Chapter 7 begins by interrogating glosses on *R. v. Tibbs* [1824] which assert that William Tibbs' conviction for the manslaughter of a 'black man' represents a significant example of disinterested settler-indigenous legal relations. As Pedder's first criminal trial in the Supreme Court, the case has been invoked to illustrate the chief justice's 'enlightened attitude' towards the Indigenous people.⁴ Where these readings cast Pedder as a benevolent foundation judge who did not discriminate against Indigenous people on the basis of race, Chapter 7 demonstrates that this interpretation

³ Extract of the Minutes of the Executive Council, 23 February 1831, in A.G.L. Shaw (ed.), *Van Diemen's Land: Copies of all Correspondence between Lieutenant-Governor George Arthur and His Majesty's Secretary of State for the Colonies on the Subject of the Military Operations lately carried out against the Aboriginal Inhabitants of Van Diemen's Land* (London, House of Commons, 1831; facsimile edition, Hobart, Tasmanian Historical Research Association, 1971), (hereafter Shaw, *Military Operations*), p. 82; J. Bonwick, *The Last of the Tasmanians; or, The Black War of Van Diemen's Land* (London, Sampson Low, Son & Marston, 1870), p. 240.

⁴ G. Green, 'Foreword', J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. vii.

hangs on the unsupported assumption that 'black' was synonymous with Aboriginal during the early colonial period.

Predating the first Indigenous murder prosecution in the Supreme Court of New South Wales in 1827, *R. v. Mosquito and Black Jack* [1824] and *R. v. Jack and Dick* [1826] represent significant early assertions of settler sovereignty in Van Diemen's Land. Overshadowed by the New South Wales *terra nullius* cases of *R. v. Murrell and Bummaree* [1836] and *R. v. Bonjon* [1841], however, their precedential value has been overlooked by legal historians. Chapter 8 examines Pedder's decisive judicial role in facilitating Indigenous prosecutions at a time when law officers in the sister colony expressed uncertainty about the amenability of Indigenous people to settler law, and only tentatively asserted their jurisdiction to hear cases involving Indigenous-settler collision.

Moving from the courthouse to the council chamber, Chapter 9 traces Pedder's shifting extra-curial interpretation of the Black War through a close reading of his responses to two key policy decisions: the expulsion proclamation of 15 April 1828, and the policy of expatriation approved by the Executive Council in February 1831. Contemporary correspondence and minutes of meeting suggest that Pedder's capacity to distinguish between the legalism required of him as chief justice, and his personal sympathy for Indigenous people, is not shared by historians and other commentators. Echoing Henry Reynolds's critique of a Tasmanian historiographical tradition that has 'no room for complexity',⁵ this final chapter argues that Pedder's legalistic reading of the Black War has been largely ignored, while his more appealing humanitarian concern for Indigenous survivors has been oversimplified and overstated by scholars since Bonwick.

⁵ H. Reynolds, *Fate of a Free People* (Melbourne, Penguin Books, 1995), p. 189.

CHAPTER 7

R. v. TIBBS [1824]: A CASE OF MISTAKEN IDENTITY

Late on a Saturday night in January 1824, a young English convict, named William Tibbs, fired his pistol at a man he mistook for a 'robber'.¹ A single shot pierced the man's ribcage 'on his right side', causing a 'mortal wound of the depth of five inches' from which he 'instantly expired'.² Following a coroner's inquest, Tibbs was committed to appear before the Supreme Court of Van Diemen's Land, where he was indicted on a charge of 'shooting at a black man, named John Jackson ... whereby the unfortunate man lost his life'.³ R. v. Tibbs [1824] was the first case heard by Chief Justice Pedder in the newly established Supreme Court. In summing up the evidence against Tibbs, His Honour confidently declared that there were 'but two questions' for the consideration of the jury: the first, 'whether the prisoner at the bar was the person who fired the pistol'; the second, 'how far he was justified in so doing'.⁴ Unconvinced that Tibbs was justified in shooting at Jackson, a jury of seven military officers found him guilty 'in a few minutes'.⁵ Tibbs was convicted of manslaughter, and sentenced to three years' secondary transportation.⁶

Neither the brief law report published in the *Hobart Town Gazette* nor any official comment from the colonial administration or from Pedder as trial judge links Tibbs' conviction for manslaughter to conflict between colonists

¹ A.G.L. Shaw (ed.), John West, *The History of Tasmania* (Sydney, Angus and Robertson, 1981), p. 2.

² Archives Office of Tasmania (hereafter AOT), Tasmanian Archival Estrays in the State Library of New South Wales: Dixon Collection, Add. 554/296, Chief Justice Reports, vol. 6, 1823-1830, MM71/1/7, f. 1, reel Z3234.

³ R. v. Tibbs [1824], B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_tibbs/> accessed 1 January 2012.

⁴ *Hobart Town Gazette*, 28 May 1824, p. 2.

⁵ *Hobart Town Gazette*, 28 May 1824, p. 2.

⁶ *Hobart Town Gazette*, 6 August 1824, p. 2.

and the Aboriginal people of Van Diemen's Land.⁷ Indeed, as colonial pressman and historian Henry Melville railed in his *History of Van Diemen's Land* (1835), 'not one single individual was ever brought to a Court of Justice, for offences committed against these harmless creatures'.⁸ Academic historians have long accepted Melville's claim.⁹ In the first decade of the twenty-first century, however, a counter-narrative has emerged in other historical genres, which reads Tibbs' conviction for the manslaughter of a 'black man' as a significant example of settler-indigenous legal relations.

Challenging the underlying assumption of this reading – that 'black' is synonymous with Aboriginal – this chapter tests the central claims of the counter-narrative. Section 7.1 charts the ways in which Tibbs' case has been invoked to illustrate the impartial administration of justice in cases involving Indigenous victims. Highlighting the presence of non-Indigenous people of colour in Van Diemen's Land during the early colonial period, section 7.2 emphasises that, in the fluid language of early nineteenth-century racial identification, 'black' was deployed as a signifier of both Indigenous and non-Indigenous identity.

Informed by recent scholarship on the multi-racial settlement of the Australian colonies, section 7.3 makes the first serious attempt to identify the 'black man', John Jackson, in the archives of empire. Finally, section 7.4

⁷ No official law reports were published in Tasmania until the end of the nineteenth century. Instead, recovering colonial case law depends on the law reports, and some trial transcripts, published by local newspapers during the colonial period.

⁸ G. Mackaness (ed.), Henry Melville, *The History of Van Diemen's Land from the Year 1824 to 1835 Inclusive, During the Administration of Lieutenant-Governor George Arthur* (Sydney, Horwitz, 1965; originally published London, Smith and Elder, 1835), p. 59. Original emphasis.

⁹ Lyndall Ryan does not include Jackson's death in her discussions of settler violence against Aborigines, while Lloyd Robson notes that 'in comparison' to the execution of four Aboriginal men tried in the Supreme Court for their involvement in the murders of stock-keepers, the only official punishment of whites was 'twenty-five lashes ... administered to some Europeans for indescribable brutality to native women in November 1824'. L. Ryan, *The Aboriginal Tasmanians* (Sydney, Allen & Unwin, 1996), ch. 5, and 'Abduction and multiple killings of Aborigines in Tasmania: 1804-1835', *Genocide Studies Project Working Paper No. 35* (2007), p. 9; L.L. Robson, *A History of Tasmania, Volume I: Van Diemen's Land from the Earliest Times to 1855* (Melbourne, Oxford University Press, 1983), p. 211.

questions whether contemporaries drew any connection between Tibbs' case and frontier conflict, and the extent to which Pedder's hearing of the case might exemplify the disinterested application of the law or his own attitudes towards the Indigenous.

7.1 Tibbs' case: the counter-narrative

The case against William Tibbs was the first to come before the newly installed chief justice when the Supreme Court of Van Diemen's Land opened in May 1824. In 2003, Pedder's judicial biographer, J.M. Bennett, speculated that Tibbs' case was 'perhaps' given 'pre-eminence' (as the first case heard) in order to 'create an artificial impression that the law would be applied equally' to what he describes as 'the two races'.¹⁰ In his 'Foreword' to Bennett's biography, Pedder's judicial successor, Sir Guy Green, construed the case as a genuine expression of the impartiality of the rule of law and Pedder's own 'enlightened attitude'.¹¹ More emphatically, in a speech of 2006, Sir Guy lauded Tibbs' case as a 'seminal example' of the impartial administration of justice in cases relating to settler-indigenous conflict, which, he asserted, historians had somehow 'managed to overlook'.¹²

On the other hand, Tasmanian author and local historian, Robert Cox, has interpreted the ostensibly minor sentence imposed by Pedder as evidence of the leniency with which offenders against the island's original inhabitants were treated by the colonial administration. In a monograph of 2004, Cox argues that 'killing Aborigines was only theoretically a capital offence' under Governor Arthur, and goes on to dismiss Tibbs' sentence to secondary transportation for the 'manslaughter of an Aborigine' as little more than

¹⁰ J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. 67.

¹¹ G. Green, 'Foreword' in Bennett, *Sir John Pedder*, p. vii. Green served as Chief Justice of Tasmania, 1973-1995.

¹² G. Green, 'The marginalisation of law in Australia', Order of Australia Oration, 2006, p. 9, <<http://www.theorderofaustralia.asn.au/downloads/OAA2006ORATIONSirGuyGreen.pdf>> accessed 5 November 2009.

‘a three-year extension’ to the convict’s original sentence.¹³ In order to underscore its apparent leniency, Cox erroneously compares Tibbs’ punishment with contemporaneous executions for sheep-stealing.¹⁴ This emotive comparison is misleading, however, for manslaughter was never a capital offence.¹⁵

The opposing strands of interpretation of Tibbs’ case rest on the key assumption that his victim was an Aboriginal man. The origins of John Jackson’s fictive Aboriginality appear to lie with Brian Plomley, who, in 1966, indirectly identified Jackson as an Aborigine in an unreferenced endnote to *Friendly Mission*, his edition of George Augustus Robinson’s journals. Discounting Melville’s claim of 1836 that no European was ever charged for offences against the Indigenous people, Plomley asserted that Tibbs was convicted of a ‘crime against the aborigines’.¹⁶ Almost forty years later, in *The Fabrication of Aboriginal History*, Keith Windschuttle embellished Plomley’s conclusion, describing (the again unnamed) Jackson as an ‘assimilated Aborigine’.¹⁷

These recent assertions conflict with the historical consensus, founded on the evidence of the colonial archive and maintained by academic historians. Moreover, the underlying premise that ‘two races’ were present in Van

¹³ R. Cox, *Steps to the Scaffold: The Untold Story of Tasmania’s Black Bushrangers* (Pawleena, Cornhill Publishing, 2004), pp. 8-9.

¹⁴ Cox, *Steps to the Scaffold*, p. 9. Reflecting the importance of livestock to rural economies, sheep-stealing became a capital offence under 14 Geo. II, c. 6, *An Act to render the Laws more effective for Preventing the Stealing and Destroying of Sheep* (1741).

¹⁵ Manslaughter constituted unlawful killing, but was distinguished from murder by the absence of malice and premeditation. From 1822, traditional sanctions of ‘burning in the Hand’ and ‘other Punishments’ were replaced by transportation, imprisonment or pecuniary fine. W. Blackstone, *Commentaries on the Laws of England* (Oxford, The Clarendon Press, 1765-1769), Book IV, Chapter 14, p. 191; 3 Geo. IV, c. 38, *An Act for the further and more adequate Punishment of Persons convicted of Manslaughter, and of Servants convicted of robbing their Masters, and of Accessories before the Fact to Grand Larceny, and certain other Felonies* (1822), s. 1.

¹⁶ N.J.B. Plomley (ed.), *Friendly Mission: The Tasmanian Journals and Papers of George Augustus Robinson, 1829-1834* (Hobart, Tasmanian Historical Research Association, 1966), p. 43, n. 42. Plomley does not name Tibbs’ victim.

¹⁷ K. Windschuttle, *The Fabrication of Aboriginal History. Volume One: Van Diemen’s Land, 1803-1847* (Paddington, Macleay Press, 2002), p. 191, n. 74.

Diemen's Land in the 1820s reiterates a 'black/white binary' of black indigenes and white colonisers,¹⁸ which ignores recent scholarship on the presence of non-Indigenous blacks during the colonial period and, more broadly, on race as a malleable social construct. The suppositions of Bennett, Green, Cox, Plomley and Windschuttle exemplify Cassandra Pybus' critique of the 'almost universal' tendency of Australian historiography to 'read late nineteenth- and twentieth-century racial assumptions' into the early colonial period.¹⁹ In contrast to twentieth-century foundation narratives which chronicle the triumphant rise of a democratic, 'white Australia', recent research by Pybus and other historians of empire demonstrates that colonisation was a 'multi-racial process'.²⁰

7.2 Non-indigenous blacks: people of colour in Van Diemen's Land

Many members of the African diaspora, including former slaves, arrived in the southern colonies as sailors and convicts from the British Isles, the Caribbean and the Cape.²¹ Migrants from the Indian Ocean and the Pacific

¹⁸ C. Pybus, *Black Founders: The Unknown Story of Australia's First Black Settlers* (Sydney, University of New South Wales Press, 2006), p. 181.

¹⁹ Pybus, *Black Founders*, p. 180.

²⁰ Pybus, *Black Founders*, pp. 180-181. Similarly, Lake and Reynolds emphasise the perceived connection between race and the capacity for self-government which underpinned late nineteenth-century assertions of 'whiteness' in Australia and other settler societies. M. Lake and H. Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne, Melbourne University Press, 2008), pp. 5, 6.

²¹ Research linking the African diaspora to the Australian colonies has been published since the 1980s. See, for example, C. Anderson, 'Unfree labour and its discontents: Transportation from Mauritius to Australia, 1820-1850', *Australian Studies* 13 (1) (1998), pp. 116 – 133; and "'Weel about and turn about and do jis so, eb'ry time I weel about and jump Jim Crow": Dancing on the margins of the Indian Ocean' in S. Agha and E. Kolsky (eds.), *Fringes of Empire: Peoples, Places, and Spaces in Colonial India* (New Delhi, Oxford University Press, 2009), pp. 169-187; I. Duffield, 'From slave colonies to penal colonies: The West Indian convict transportees to Australia', *Slavery & Abolition* 7 (1) (1986), pp. 25-45; 'Daylight on convict lived experience: The history of a pious negro servant', *Tasmanian Historical Studies* 6 (2) (1999), pp. 29-62; and "'Stated this offence": High-density convict micro-narratives' in L. Frost and H. Maxwell-Stewart (eds.), *Chain Letters: Narrating Convict Lives* (Melbourne, Melbourne University Press, 2001), pp. 119-135; V.C. Malherbe, 'Khoikhoi and the question of convict transportation from the Cape, 1820-1845', *South African Historical Journal* 17 (1985), pp. 19-50; and 'South African Bushmen to Australia? Some soldier convicts investigated', *Journal of Australian Colonial History* 3 (1) (2001), pp. 100-124; C. Pybus, 'A touch of the tar: African settlers in colonial Australia and the implications for issues of Aboriginity', *London Papers in Australian Studies No. 3* (London, University of London, 2001), pp. 1-24; Pybus, 'His country marks: African soldiers from the Caribbean regiments transported to the Australian penal colonies', *Australian Cultural History* 21 (2002),

were also among the many non-Europeans who arrived in Van Diemen's Land ports,²² often as crewmen of whalers, other merchant shipping, and maritime survey and exploration expeditions.²³ Disputing Windschuttle's assertion that Tibbs' victim was an 'assimilated Aborigine', James Boyce posits just such a scenario.²⁴ Arguing that John Jackson is unlikely to have been Indigenous, Boyce highlights the anomaly of his identification as a 'black man' in a newspaper which consistently referred to Aboriginal people as 'natives'.²⁵ Instead, Boyce conjectures that Jackson is 'most likely' to have been a black sailor visiting the 'cosmopolitan port' of Hobart Town.²⁶ He goes on to speculate (erroneously) that his death was 'the result of a pub brawl' with a convict.²⁷

Convict records provide many examples of non-Indigenous blacks transported to Van Diemen's Land in the period pre-dating Jackson's death. The origins and occupations of the men of colour who arrived before 1824 were varied. Their native places included America, Barbados, Jamaica, and St Kitts. Others hailed from Africa, Bengal, Dublin and London. Many were sailors, but other occupations were also represented, including caulker, barber, blacksmith and domestic servant. The recurring description of the

pp. 33-39; and J. Bradley and C. Pybus, 'From slavery to servitude: The Australian exile of Elizabeth and Constance', *Journal of Australian Colonial History* 9 (2007), pp. 29-50.

²² Pybus counts 60 men and women from India, Mauritius and Ceylon among the 500 people of colour who arrived in Van Diemen's Land before 1850. C. Pybus, 'Mannalargenna's daughters', *Out/Back: Heat* 15 (2001), p. 103. Duffield refers to unpublished data on 'about 800 Africans' among 'Australia's convict settlers' collected by Duffield and Pybus. Duffield, 'Stated this offence', p. 135.

²³ Pybus, 'A touch of the tar', p. 20.

²⁴ J. Boyce, 'Fantasy Island' in R. Manne (ed.), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (Melbourne, Black Inc., 2003), p. 36. Boyce quotes from Windschuttle, *Fabrication of Aboriginal History*, p. 191.

²⁵ Boyce, 'Fantasy Island', p. 36. Boyce highlights the 'consistent' use of the term 'native' by the *Hobart Town Gazette*, even when referring to 'civilised' Aborigines.

²⁶ Boyce, 'Fantasy Island', p. 36.

²⁷ Boyce, 'Fantasy Island', p. 37. Though chiding Windschuttle for not consulting standard works, such as John West's *History of Tasmania*, Boyce himself appears to have missed West's account of Jackson's death. While West does not name Jackson, he clearly identifies Tibbs' victim as 'a negro'. Boyce, 'Fantasy Island', p. 18; West, *History of Tasmania*, p. 82.

men's eyes, hair and complexion as 'Black & all Black' stands out among the grey eyes and ruddy complexions of the Anglo-Celtic convicts.²⁸

Five male convicts variously described as 'black' arrived in Van Diemen's Land in 1817 aboard the *Pilot*, and their descriptions illustrate the range of individuals transported to the colony. Samuel Munday was a servant from London. According to the ship's muster, his eyes, hair and complexion were 'Black & all Black'.²⁹ John Johannes, a native of Bengal, was similarly described, though his complexion was characterised as 'Dingey Black'.³⁰ Tried in London, William Tyson was originally from St Kitts. Under 'Complexion', the clerk entered the words 'Half Cast [*sic*]'.³¹ Richard Simmon(d)s and Thomas Franklin were both American. Simmon(d)s, a pastry cook, was categorised as an 'American Half Cast [*sic*]'.³² while Franklin, a seaman from Baltimore, was an 'American Black'.³³ Three other convicts described as men of colour arrived in the colony in 1817, this time aboard the *Lady Castlereagh*. Edward Hale, a servant originally from Jamaica, was designated 'Black or Man of Colour'.³⁴ William Johnson, a barber tried at Bristol, and George Evans, a servant tried at the Surrey Assizes, both had 'black' eyes, hair and complexion.³⁵ Instead of recording each man's native place, the clerk wrote 'Am[erica]n Man of Colour'.³⁶

A small number of free people of colour also inhabited the fringes of the

²⁸ AOT Assignment Lists and Associated Papers, CON13/1/1, ff. 61, 187-188, 205-206, 209, reel Z2492; Colonial Secretary's Office, General Correspondence, CS01/1/403, ff. 125-126, 127-128, 136-137, reel Z1846.

²⁹ CON13/1/1, f. 61, reel Z2492.

³⁰ CS01/1/403, ff. 136-137, reel Z1846.

³¹ CS01/1/403, ff. 125-126, reel Z1846.

³² CON13/1/1, f. 61, reel Z2492. Richard Simmon(d)s was tried at the Old Bailey, 15 January 1817, for stealing swords and guns during the Spa Fields Riot of December 1816. I. Duffield, "I asked how the vessel could go": The contradictory experiences of African and African Diaspora mariners and port workers in Britain, c. 1750-1850' in A. Kershen (ed.), *Labour, Language and Migration* (Aldershot, Ashgate, 2000), pp. 141-143; *Proceedings of the Old Bailey*, Reference Number: t18170115-69.

³³ CS01/1/403, ff. 127-128, reel Z1846.

³⁴ CON13/1/1, ff. 205-206, reel Z2492.

³⁵ CON13/1/1, ff. 187-188, 209-210, reel Z2492.

³⁶ CON13/1/1, ff. 187, 209, reel Z2492.

colonial élite. Anglo-Irish entrepreneur, Roland Walpole Loane, lived for many years in 'open and infamous adultery' with Madame D'Hotman,³⁷ a 'woman of Colour or creole' from the former French slave colony of Mauritius.³⁸ Margaret D'Hotman and her children had arrived in Hobart Town with Loane in 1809 aboard the *Union*.³⁹ Nine years later, their multi-racial household included servants whose slave origins are clearly indicated by the absence of surnames: 'Boxho, Valentine, Hippolitus, and Depruse' were 'male servants' to Mr Loane, while 'Manao and Serafin' were 'female servants to Madame Dhotman [*sic*]'.⁴⁰

Perhaps the most prominent free person of colour in Van Diemen's Land during the 1820s was landowner, erstwhile colonial official, and anti-government newspaper editor, Gilbert Robertson.⁴¹ Referred to privately by George Augustus Robinson as 'Black Robertson', and by Governor George Arthur as a 'mulatto from America', Robertson was visibly dark skinned.⁴² Illustrating the propensity of twentieth-century historiography to overlook people of colour in national foundation narratives, Robertson's 1967 entry in the *Australian Dictionary of Biography*

³⁷ Honner to Goulburn, 9 November 1823, *HRA* III, IV, p. 529. Major Honner refers to Madame D'Hotman as an 'unfortunate french [*sic*] Woman'.

³⁸ CSO1/1/780/16657, f. 278, reel Z1931. Mr Savage, a justice of the peace in Sydney, reported that, 'Marguitte (*soi-disant* Madame D'Hotman) was never married to Mr D'Hotman' because 'untill [*sic*] very lately a Law existed at Mauritius which prevented a possibility of a white man marrying a woman of Colour or a creole of the Country'. See also G. Lennox, 'The battle for "Belle Vue"', *THRA PP* 49 (3) (2002), pp. 178, 180-181; I. Schaffer, 'Madam De Hotman "Belle Vue" Davey Street Hobart Town', [n.d.], [Pamphlets relating to early Tasmania, State Library of Tasmania]; and F.C. Green, 'Loane, Roland Walpole (-1844)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/loane-roland-walpole-2364/text3099>> accessed 30 November 2009.

³⁹ CSO1/1/780/16657, f. 278, reel Z1931.

⁴⁰ *Hobart Town Gazette*, 8 August 1818, p. 2. Slaves were generally identified by a single name of classical, biblical, geographical or African origin. T.G. Burnard, 'Slave naming patterns: Onomastics and the taxonomy of race in eighteenth-century Jamaica', *Journal of Interdisciplinary History* 31 (3) (2001), p. 346.

⁴¹ C. Pybus, 'Gilbert Robertson' in A. Alexander (ed.), *The Companion to Tasmanian History* (Hobart, Centre for Tasmanian Historical Studies, 2006), <http://www.utas.edu.au/library/companion_to_tasmanian_history/R/Robertson%20Gilbert.htm> accessed 10 December 2009.

⁴² Journal of George Augustus Robinson, 14 February 1831, in Plomley, *Friendly Mission*, p. 317; C. Pybus, 'A self-made man' in A. Johnston and M. Rolls (eds.), *Reading Robinson: Companion Essays to Friendly Mission* (Hobart, Quintus Publishing, 2008), p. 101.

identifies his birthplace as Trinidad, but makes no mention of his African heritage.⁴³ By contrast, Pybus has recently identified Robertson as the 'bastard son of a Scottish plantation owner and his West Indian slave mistress'.⁴⁴

As the presence of these people of colour in Van Diemen's Land attests, it cannot be assumed that 'black' was synonymous with Aboriginal in the early colonial period. Predating the fixed taxonomies of race of the second half of the nineteenth century, colonial sources relating to John Jackson illustrate the fluidity of racial categorisation: he is described variously as a 'man of color [*sic*]', a 'black man' and a 'negro'.⁴⁵ In order to draw any conclusions from Tibbs' case about settler-indigenous legal relations – and, indeed, Chief Justice Pedder's attitudes towards the Aborigines – it is first necessary to substantiate the identity of Tibbs' victim.

7.3 Identifying John Jackson: life and death in the archives of empire

Five convicts named John Jackson were transported to Van Diemen's Land before 1824.⁴⁶ All but one may be discounted, for the records show they were alive after that year. The fifth was a middle-aged soldier from the former slave-owning colony of North Carolina.⁴⁷ Tried for rape at the Old Bailey on 6 June 1821, Jackson's sentence of death was commuted to transportation for life, and he arrived in Van Diemen's Land aboard the

⁴³ M. Godfrey, 'Robertson, Gilbert (1794-1851)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020339b.htm>> accessed 10 December 2009.

⁴⁴ C. Pybus, 'Robinson and Robertson' in R. Manne (ed.), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (Melbourne, Black Inc. Agenda, 2003), p. 274.

⁴⁵ *Hobart Town Gazette*, 23 January 1824, p. 2; 28 May 1824, p. 2; West, *History of Tasmania*, p. 82.

⁴⁶ Convicts named John Jackson arrived per *Lady Castlereagh* (1817), *Admiral Cockburn* (1819), *Lord Hungerford* (1821), and two men of the same name per *Claudine* (1821). AOT Index to Tasmanian Convicts.

⁴⁷ CS01/1/403, ff. 184-185, reel Z1846. Jackson's army discharge papers also give his place of birth as Wilmington, in 'America'. The National Archives (hereafter TNA), Royal Hospital Chelsea: Soldiers service documents, 1760-1854, WO 97/1123/76, f. 1. While it unclear how Jackson came to be in England, many runaway slaves fought with the British in the American Revolution, and later migrated to England. Pybus, *Black Founders*, p. 30; C. Pybus, *Epic Journeys of Freedom: Runaway Slaves of the American Revolution and their Global Quest for Liberty* (Boston, Mass., Beacon Press, 2006), pp. 57-62.

Claudine on 15 December.⁴⁸ Colonial convict records indicate that this man had 'dark brown' eyes and 'black' hair.⁴⁹ No information is recorded for his complexion, however; neither is he referred to by any of the terms used to identify people of colour. By contrast, documents from the metropolitan archive verify his African-diaspora heritage.

War Office records reveal that Jackson was discharged from the British Army in 1814. Having enlisted as a private 'at the Age of Fortyseven', he served with the 43rd Regiment of Foot and the 3rd Royal Veterans Battalion for just over five years, before being demobilised 'in consequence of the Reduction'.⁵⁰ The description added to Jackson's discharge to 'prevent improper use being made of [the document] by its falling into other Hands' attests that he had 'Black Hair, Black Eyes', and a 'Black Complexion'.⁵¹ Petitions for clemency from two senior officers of the 43rd Regiment further confirm his identity as a man of colour. In a character reference written eight days after Jackson's conviction, Lieutenant-Colonel Christopher C. Patrickson identifies him as 'a Negro now under sentence of death in consequence of a Conviction for a Rape'.⁵² Jackson, he relates, had served under him for several years, and 'was generally considered a man of excellent character'.⁵³ A second appeal, from Lieutenant-Colonel William Napier, similarly identifies the condemned man as 'a negro named John Jackson, formerly a soldier in my Regt. [*sic*]'.⁵⁴

Napier's petition for the 'extension of His Majesty's mercy to this unfortunate

⁴⁸ CSO1/1/403, ff. 184-185, reel Z1846; Conduct Record, John Jackson, CON31/1/23, f. 53, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-23,217,77,L,80> accessed 22 December 2009. For the cursory published record of Jackson's trial, see *Proceedings of the Old Bailey*, Reference Number: t18210606-4.

⁴⁹ CSO1/1/403, ff. 184-185, reel Z1846.

⁵⁰ WO 97/1123/76, f. 1. The 43rd Regiment of Foot was active in North America, but had returned to Europe by the time Jackson enlisted, c. 1809.

⁵¹ WO 97/1123/76, f. 1.

⁵² Deposition of Christopher C. Patrickson, 14 June 1821, TNA Joseph Hatton: Collection of Home Office criminal papers. Henry, Viscount Sidmouth Home Secretary, 11 June 1812 - 16 Jan 1822: Letters to various or unnamed persons, 1821, PRO 30/45/1, f. 614.

⁵³ PRO 30/45/1, ff. 614-614a.

⁵⁴ Napier to Sheriff Waithman, 18 June 1821, PRO 30/45/1, f. 618.

... man' calls attention to the presence of black soldiers in regular regiments of the British Army, and pinpoints Jackson's role as a musician.⁵⁵ Surprised to learn that a man of previously 'excellent' character 'should have suddenly plunged into such depravity',⁵⁶ Napier made enquiries into Jackson's case, which led him into conversation with the sheriff. In a letter dated 18 June 1821, Napier sought to counter the 'prejudice' which had been created 'in the minds' of the sheriff and the jury by the 'ludicrous and uncouth gestures of the Prisoner while making his defence'.⁵⁷ On hearing Sheriff Waithman's description, Napier wrote, he 'instantly recognized [the gestures] as the same which [Jackson] had been taught to adopt while playing the Cymbals, after a foolish custom common to all regiments of teaching their black Cymbals and Tambourine players to throw themselves into a variety of absurd and uncouth attitudes'.⁵⁸ As Peter Fryer has demonstrated in his seminal history of black people in Britain, black military bandsmen had been prized since the middle of the eighteenth century and 'every British regiment with any pretensions to smartness had its corps of black musicians'.⁵⁹ Dressed in colourful, 'oriental' uniforms, black regimental musicians performed as 'time-beaters' when soldiers were marching, and also transmitted signals during battle.⁶⁰ Resonating with Napier's contemporary observations, Fryer notes that black musicians entertained onlookers with displays of 'vigorous bodily movements as they played'.⁶¹

Framed by national(ist) discourses of Aboriginal dispossession and reconciliation, existing glosses on Tibbs' case ignore international scholarship linking the Atlantic African diaspora to early colonial Australia.⁶² This local focus also obscures nineteenth-century meta-narratives of forced

⁵⁵ PRO 30/45/1, f. 619.

⁵⁶ PRO 30/45/1, f. 618.

⁵⁷ PRO 30/45/1, ff. 618-618a.

⁵⁸ PRO 30/45/1, ff. 618-618a.

⁵⁹ P. Fryer, *Staying Power: The History of Black People in Britain* (London, Pluto Press, 1984), p. 83.

⁶⁰ Fryer, *Staying Power*, pp. 86-87. Jackson's discharge paper indicates that he had sustained a 'head wound', possibly during the course of battle. WO 97/1123/76, f. 2.

⁶¹ Fryer, *Staying Power*, p. 86.

⁶² Duffield, 'Stated this offence', p. 135.

migration and underestimates mobility in the wider British colonial world.⁶³ By contrast, turning our gaze outward to trace Jackson's pre-convict life quickly dissolves the illusion that he was an anonymous Indigene.

Where the local archive hints at Jackson's origins, it confirms his ultimate fate. Written in large pencil letters in the body of his convict conduct record is a single word, 'Shot'.⁶⁴ A brief outline of the events surrounding Jackson's death in Van Diemen's Land can be reconstructed from the fragmentary evidence of the colonial press. The *Hobart Town Gazette* reported that, on the night of 17 January 1824, John Jackson was 'apparently shot near the premises of A.F. Kemp' by 'William Tibbs, assigned servant to Mr Kemp'.⁶⁵ A native of Devon in his early twenties, Tibbs had been sentenced to seven years' transportation at the Old Bailey for 'Stealing a Coat'.⁶⁶ His conduct record states that he had most recently been employed in London as a footman.⁶⁷ Tibbs was 'well recommended on his arrival' in Van Diemen's Land in August 1823, and soon assigned to Kemp.⁶⁸ He had been in the colony only five months when he shot Jackson.

Tibbs' new master, Anthony Fenn Kemp, was a high-profile and turbulent colonist, who held both mercantile premises in Hobart Town and pastoral land in the Southern Midlands.⁶⁹ His country estate, *Mount Vernon*, was situated at Cross Marsh, approximately 30 miles from Hobart Town and near

⁶³ cf. Anderson, 'Weel about and turn about', p. 182.

⁶⁴ Conduct Record, John Jackson.

⁶⁵ *Hobart Town Gazette*, 23 January 1824, p. 2.

⁶⁶ Conduct Record, William Tibbs, CON31/1/42, f. 84, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-42,190,87,S,80> accessed 28 October 2009; *Proceedings of the Old Bailey*, Reference Number: t18220109-110.

⁶⁷ Conduct Record, William Tibbs.

⁶⁸ *Hobart Town Gazette*, 28 May 1824, p. 2. Tibbs arrived per *Commodore Hayes*, 16 August 1823.

⁶⁹ Kemp had been involved in the coup against Governor Bligh and the recall of Lieutenant-Governor Sorell. M.C. Kemp, 'Kemp, Anthony Fenn (1773?-1868)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A020037b.htm>> accessed 12 December 2009.

the main road through the 'settled districts'.⁷⁰ The law report in the *Hobart Town Gazette* does not indicate the location of the shooting; neither does its report of the inquest give any further information.⁷¹ Other evidence suggests the shooting might have occurred at Kemp's country estate. Writing thirty years after the event, colonial historian John West recounted that, 'Though not a constable, [Jackson] found pleasure in detecting the crimes of others, and had in some instances succeeded'.⁷² Like many convict and emancipist informers, Jackson probably hoped to benefit from the incentives – including land, free pardons and money – offered by the colonial government to help apprehend the convict banditti who menaced settlers in the island's interior.⁷³

Mount Vernon was within the territorial boundaries of the Big River people.⁷⁴ Kemp had received the first land grant in the area in 1817, but was not the only intruder into the hunting grounds of the local Aboriginal population; around the time of Jackson's death, it was not Indigenous guerrillas, but convict bushrangers who threatened Kemp and his servants.⁷⁵ Indeed, the following year, Kemp's farm manager, Thomas Hooper, was twice attacked and robbed by convict absconders and bushrangers.⁷⁶ In the first attack his

⁷⁰ West, *History of Tasmania*, p. 541.

⁷¹ Similarly, Jackson's burial record is inconclusive. AOT RGD34/1/1 records that 'Jackson' was buried in the 'Parish of St David's, Hobart Town' on 21 January 1824. His identity is confirmed with the remark 'Convict Shot'. Thanks to Tony Staggs for providing a copy of the burial record, and for his insights into the potential difficulties of identifying the precise location of burial, and also to Ron Mallett for alerting me to some of the issues around locating early convict burials. Richard Tuffin's useful article on convict burials focuses on a later period. R. Tuffin, 'The post-mortem treatment of convicts in Van Diemen's Land, 1814-1874', *Journal of Australian Colonial History* 9 (2007), pp. 99-126.

⁷² West, *History of Tasmania*, p. 82. Significantly, West's account of Tibbs' crime is not contained in his chapters on the Tasmanian Aborigines.

⁷³ In 1818, Lieutenant-Governor Sorell offered a 'Reward of One Hundred Guineas' and promised to recommend to the Governor-in-Chief at Sydney 'for a Free Pardon and his passage to England, any Crown Prisoner who shall be the means of apprehending' the notorious bushranger, Michael Howe. Similar incentives were offered by Governor Arthur in 1826, including 100 guineas, 300 acres of land, a free pardon and free passage to England, for information leading to the apprehension of bushrangers charged with murder. *Hobart Town Gazette*, 31 January 1818, p. 1; 4 March 1826, p. 1.

⁷⁴ Ryan, *The Aboriginal Tasmanians*, pp. 15-16.

⁷⁵ Ryan asserts that, until 1825, bushrangers posed a 'more serious threat' to settlers than did the Aborigines. Ryan, *The Aboriginal Tasmanians*, p. 78.

⁷⁶ *Hobart Town Gazette*, 15 July 1825, p. 3; 8 October 1825, p. 2. In the first incident, two

gun was stolen.⁷⁷ While Hooper was a 'free settler',⁷⁸ Kemp was evidently arming his convict servants as well.

West's retelling of events implies that Tibbs was acting to protect Kemp's property when he shot at Jackson. Used to employment in domestic service in England, Tibbs would have understood his obligations under master and servant legislation to prevent the theft of his master's property.⁷⁹ He certainly appears to have acted more diligently than some of his fellow servants. After a raid on Kemp's farm by bushrangers in July 1825, the *Hobart Town Gazette* reported that 'some suspicion' had arisen 'that Mr Kemp's crown servants, at the Cross Marsh, either connived at the late robbery by [convict absconders] Brady and M'Cabe [*sic*] ... or did not use the proper means to prevent it'.⁸⁰

Illustrating the potential for misreading identities at the colonial frontier, West highlights the use of dissembling and disguise. Some convict absconders, he reports, 'pretended to be constables' in order to gain admission to settlers' huts; others 'blackened' their faces.⁸¹ In the cultural world of the British colonists, the link between blacking and banditry was enshrined in the severe provisions of the *Waltham Black Act* of 1723, which had been 'occasioned by the devastations committed in Epping forest ... by

convict absconders assaulted Hooper and stole his gun; in the second, Hooper was held up by bushrangers. R. v. Priest and Brown [1825], *Decisions of the Nineteenth Century Tasmanian Superior Courts*,

<http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_priest_and_brown/> and R. v. McCabe [1825],

<http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_mccabe/> accessed 1 January 2012.

⁷⁷ R. v. Priest and Brown [1825].

⁷⁸ *Hobart Town Gazette*, 15 July 1825, p. 3.

⁷⁹ Imperial legislation was consolidated under 4. Geo. IV, c. 34, *Master and Servants Act* (1823).

⁸⁰ *Hobart Town Gazette*, 16 July 1825, p. 2.

⁸¹ West, *History of Tasmania*, pp. 414-415. Other colonial records suggest that some Europeans sought to disguise themselves as Aborigines, as evidenced by an incident in which escapees from the Maria Island penal station 'blackened themselves ... to look like natives'. Journal of George Augustus Robinson, 31 January 1831, in Plomley, *Friendly Mission*, p. 347.

persons in disguise or with their faces blacked'.⁸² In this environment, West's explanation that 'a negro' was 'taken for a robber' while 'watching for thieves' is entirely plausible.⁸³

West provides no direct sources for his version of the events surrounding Jackson's death.⁸⁴ His conclusion, however, that Jackson was 'haunting the premises of a settler, by whose servant he was slain' resonates with the newspaper report of the coroner's inquest, which concluded that Jackson had been shot by Kemp's convict servant.⁸⁵ Three days after the shooting, A.W.H. Humphrey conducted an inquest 'on the body of John Jackson, a man of color [*sic*]'.⁸⁶ Coroners' records do not survive from the early 1820s; however, newspaper reports of contemporaneous investigations illustrate that colonial inquests mirrored English conventions.⁸⁷ As required by law, an inquest was convened close to the location of death, often at a farm or public house nearby. Jurors were summoned from the local area to hear evidence and return a verdict on the cause of death.⁸⁸ Of the death of John Jackson, the *Hobart Town Gazette* reported that, 'After a long investigation, the Jury gave a Verdict of – *Manslaughter* against William Tibbs'.⁸⁹ As death was the result of an unlawful killing, Tibbs was then 'committed by the Coroner to take his

⁸² Blackstone, *Commentaries*, Book 4, Chapter 17, p. 244. 9. Geo. I, c. 22, the *Waltham Black Act* (1723), provided for capital punishment of rural bandits and poachers.

⁸³ West, *History of Tasmania*, p. 82.

⁸⁴ West acknowledged the use of various 'works on the colonies' and 'valuable original papers' in compiling his *History*, originally published in 1852. P.F. Ratcliff, *The Usefulness of John West: Dissent and Difference in the Australian Colonies* (Launceston, The Alberian Press, 2003), p. 395.

⁸⁵ West, *History of Tasmania*, p. 82.

⁸⁶ *Hobart Town Gazette*, 23 January 1824, p. 2.

⁸⁷ AOT Sheriff's register (as Coroner) of findings in inquests throughout the island, SC197/1/1, dates from 1828. Contemporaneous inquests conducted into the deaths of convicts, Solomon Booth and James Miller, both resulted in verdicts which led to criminal charges being heard in the Supreme Court in 1824. *Hobart Town Gazette*, 29 March 1823, p. 2; 28 May 1824, p. 3.

⁸⁸ In Blackstone's explanation, the 'office and power of a coroner [...] consists, first, in enquiring (when any person is slain or dies suddenly) concerning the manner of his death. And this must be "*super visum corporis*" for, if the body be not found, the coroner cannot sit. He must also sit at the very place where the death happened; and his enquiry is made by a jury from four, five or six of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest of murder, he is to commit to prison for further trial'. Blackstone, *Commentaries*, Book I, Chapter 9, p. 337.

⁸⁹ *Hobart Town Gazette*, 23 January 1824, p. 2. Original emphasis.

trial before a Court of Criminal Jurisdiction'.⁹⁰

It was not unusual for a coronial inquest to investigate the death of a non-European during this early period, despite the claim of Quaker missionary, James Backhouse, in 1838 that, 'In cases of the death of [Indigenous] blacks by violent or suspicious means, I am not aware of any instance of investigation into the circumstances by coroners [*sic*] or other inquest, having taken place in any of the Australian colonies'.⁹¹ Several coronial inquests investigated Indigenous deaths in Van Diemen's Land in the 1810s and 1820s. In 1817, a 'Black Native Girl' drowned in the South Esk River,⁹² and a 'native black boy' nicknamed '*Paddy*', drowned in a pond while duck hunting.⁹³ In both cases the coroner's jury returned a verdict of accidental drowning.⁹⁴ Similarly, the death in custody of 'one of the native Aborigines' held in Richmond Gaol was investigated by the coroner in 1829.⁹⁵ In this case, the jury returned a verdict of death by the 'visitation of God', although a second post-mortem determined that an 'old spear wound' to the chest was the cause of death.⁹⁶ These examples demonstrate that, in a small number of cases, a coroner's inquest was conducted into the suspicious death of an Indigenous person, as required under common law in any case of violent or sudden death. In the context of identifying John Jackson, it is significant that the Aborigines in these cases were consistently described with a combination of the terms 'native' and 'black'. None of these

⁹⁰ *Hobart Town Gazette*, 29 March 1823, p. 2. This instance refers to James Buckley, who was committed to stand trial for the murder of Solomon Booth; the process would have been the same for Tibbs.

⁹¹ 'Extracts from a Letter to Thomas F. Buxton, respecting the Aborigines of Australia' [Backhouse to Buxton, 16 March 1838], *Extracts of the Letters of James Backhouse, Now Engaged in a Religious Visit to Van Diemen's Land, and New South Wales, Accompanied by George Washington Walker. First Part, Third Edition* (London, Harvey and Darton, 1838), p. 55.

⁹² 'Account of Inquisitions taken before the Coroner and Jury at Port Dalrymple, Van Diemen's Land, in the Years 1816 and 1817', *HRA* III, III, p. 707; J. Boyce, *Van Diemen's Land* (Melbourne, Black Inc., 2008), p. 85.

⁹³ *Hobart Town Gazette*, 13 December 1817, p. 2; 20 December 1817, p. 2; Boyce, *Van Diemen's Land*, p. 85. Original emphasis.

⁹⁴ *Hobart Town Gazette*, 13 December 1817, p. 2; 20 December 1817, p. 2.

⁹⁵ *Hobart Town Courier*, 2 May 1829, p. 1.

⁹⁶ *Hobart Town Courier*, 2 May 1829, p. 1.

Indigenous people was described as a man or woman of colour.

The term 'person of colour' resonates with the language of slavery, and would have been familiar to trans-colonial migrants and visitors to Van Diemen's Land in the 1820s. Employed in the French slave colonies to describe free people of African or mixed African-European ancestry, *gens de couleur libres* was anglicised to 'free people of colour' in the slave colonies of North America, where it was in common use after 1815.⁹⁷ Examples from the colonial press demonstrate that 'man of colour' had gained currency to identify non-Indigenous blacks in Van Diemen's Land by 1816. In that year Police Magistrate A.W.H. Humphrey – who, as coroner, later conducted the inquest into Jackson's death – cautioned 'all Persons ... against harbouring' a group recently escaped prisoners.⁹⁸ Among the 'Absentees' was 'Peter Franks (a man of colour)', the only adult among the absconders to be identified by a physical characteristic.⁹⁹ In a penal colony, racial identification clearly did not have the same implications as in slave-owning colonies, where classification by blood quatum underpinned legal and social disabilities. The brief description of Franks as a 'man of colour' mirrors the language of contemporary convict records, and may perhaps be read as a precursor to the more detailed physical descriptions of runaway convicts published in the colonial press as convict numbers increased and local printing technology improved.¹⁰⁰

⁹⁷ Even in the late eighteenth century the term was ambiguous, its sense determined by context and local usage. C. Biondi, 'Le problème des gens de couleur aux colonies et en France dans la seconde moitié du XVIIIe siècle', *Cromohs* 8 (2003), para 1, <http://www.cromohs.unifi.it/8_2003/biondi.html> accessed 18 December 2009; E.S. Wolf, *Race and Liberty in the New Nation: Emancipation in Virginia from the Revolution to Nat Turner's Rebellion* (Baton Rouge, Louisiana State University Press, 2006), p. 158.

⁹⁸ *Hobart Town Gazette*, 9 November 1816, p. 1.

⁹⁹ *Hobart Town Gazette*, 9 November 1816, p. 1. The only other absconder for whom identifying information was provided was 'Geo. Watts (a boy)'. Peter Frank, a sailor tried at Chester in 1814, was transported for life, and transhipped from New South Wales to the Derwent per *Emu* in January 1816. CON13/1/1, f. 61, reel Z2492.

¹⁰⁰ In early 1824, the *Gazette* acquired a new printing press. As the editor informed readers, 'our Columns will now allow of the insertion of more matter'. *Hobart Town Gazette*, 2 January 1824, p. 2.

Exactly contemporaneous with Tibbs' case in 1824, William Johns(t)on, 'a man of colour' transported from Dublin, was acquitted in the Supreme Court of stealing 'promissory notes to the value of £7' from his master, R.W. Loane.¹⁰¹ Significantly, as with Jackson, Johns(t)on's identification as a 'man of colour' comes not from the records of the Supreme Court, but from a newspaper which consistently referred to Aborigines as 'native' blacks. The matter-of-fact reporting that Jackson, Franks and Johns(t)on were men of colour suggests that, while noteworthy, it was not unusual to find such people in the colony. Indeed, the term continued to be employed by the colonial press to describe non-Indigenous blacks into the middle of the nineteenth century.¹⁰²

Twentieth-century constructions of the colonisation of Australia as a 'white' enterprise underpin assumptions about the 'racialised identities' of the inhabitants of Van Diemen's Land during the first half of the nineteenth century.¹⁰³ Through this prism, a misreading of the language of racial identification only too readily synonymises 'black' and Aboriginal. As the discovery that John Jackson was an American man of colour demonstrates, however, the records of the convict management system, the courts and the colonial press provide essential context for the use of 'black' as a signifier of both Indigenous and non-Indigenous identity in a multi-racial colonial community.

¹⁰¹ R. v. Johnson [1824], 25 May 1824, Supreme Court of Van Diemen's Land. Johns(t)on arrived in Van Diemen's Land from Port Jackson in 1817. A labourer from Co. Meath, he had been convicted in Dublin City in 1813 and sentenced to seven years' transportation. Dublin had the largest concentration of Africans in any European city after London. As noted above, Loane's Hobart Town household was multi-racial. *Hobart Town Gazette*, 28 May 1824, p. 3; Conduct Record, William Johns(t)on, CON31/1/23, f. 6, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-23,217,30,L,80> accessed 6 December 2009; W.A. Hart, 'Africans in eighteenth-century Ireland', *Irish Historical Studies* 33 (129) (2002), p. 22.

¹⁰² See, for example, *Hobart Town Gazette*, 7 November 1818, p. 1; 31 March 1821, p. 1S; and 22 June 1822, p. 2; *Colonial Times*, 23 October 1829, p. 3; 9 February 1836, p. 6; 13 June 1837, p. 8; and 7 September 1841, p. 2; and *Courier*, 29 April 1842, p. 3; 4 September 1847, p. 3; and 26 April 1848, p. 2.

¹⁰³ Pybus, *Black Founders*, p. 182.

7.4 The equal application of the law?

Extending the fundamental assumption that Tibbs' case involved 'legal relations between the colonists and the indigenous community',¹⁰⁴ key legal history commentators make the additional claim that Chief Justice Pedder's hearing of the case exemplifies the disinterested application of the law in Van Diemen's Land. Bennett posits that the outcome of the trial demonstrates Pedder's 'moderate perceptions' towards Aboriginal people.¹⁰⁵ More definitively, Sir Guy Green reads the proceedings against Tibbs as confirmation of Pedder's 'enlightened attitude towards the Tasmanian aborigines'.¹⁰⁶ Magnifying Bennett's gloss, Green goes on to argue that the timing of the case, as the 'first trial to take place in any Supreme Court in Australia', was 'more than symbolically significant'.¹⁰⁷ Moreover, interpreting the case as evidence that equality before the law was not 'mere propaganda' in 1820s Van Diemen's Land, Green contends that Tibbs' case gives 'real and dramatic expression' to the 'great principle that the law applies to and protects everyone – including the indigenous population'.¹⁰⁸

Throughout the early colonial period, gubernatorial proclamations and government notices certainly iterated official intent that 'injustice to or wanton cruelty against the Aborigines would be punished in accordance with British law'.¹⁰⁹ It did not necessarily follow that official proclamations moderated frontier violence. As Boyce points out, official sanctions against a variety of offences were regularly reissued because they were 'just as regularly ignored'.¹¹⁰ English law promised to 'protect' Aboriginal people, but it also criminalised acts of resistance, frequently making 'felons' of individuals who defended their territory from white incursions, as demonstrated in two contemporaneous cases from the parent colony.

¹⁰⁴ Bennett, *Sir John Pedder*, p. 67.

¹⁰⁵ Bennett, *Sir John Pedder*, p. 67.

¹⁰⁶ Green, 'Foreword' in Bennett, *Sir John Pedder*, p. vii.

¹⁰⁷ Green, 'Foreword' in Bennett, *Sir John Pedder*, p. vii.

¹⁰⁸ Green, 'The marginalisation of law in Australia', p. 9.

¹⁰⁹ cf. Arthur Phillips' instructions. *HRA* I, III, pp. 592-593.

¹¹⁰ Boyce, 'Fantasy Island', pp. 37-38.

Illustrating the contemporary legal position that it was lawful to kill a person to prevent their committing a felony, juries in the New South Wales cases of *R. v. Hawker* [1822] and *R. v. Jamieson* [1827] returned verdicts of 'justifiable homicide' in cases where a servant or householder fired at an Aboriginal aggressor. In Blackstone's explanation, 'one uniform principle' of English 'and all other laws' held that 'where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting'.¹¹¹ Moreover, the law regarded raids on a property at night as 'much more heinous' than offences committed during daylight hours, for 'at the dead of night ... sleep has disarmed the owner, and rendered his castle defenceless'.¹¹²

In 1822, in the old Supreme Court of New South Wales, farm overseer Seth Hawker was acquitted of killing a 'black native woman' on the grounds of 'provocation'.¹¹³ In the wake of recent Aboriginal attacks in the area, evidence adduced at trial was construed to prove that the defendant was 'in fear of his life' when a group of Indigenous people attacked at night.¹¹⁴ While the judge advocate lamented 'that a life (in such a case) had been untimely destroyed', he concluded that Hawker was 'only endeavouring to protect that property that was confided to his care' when he fired his musket at 'a figure ... endeavouring to take ... flight'.¹¹⁵ Judging that the killing was justifiable, on the grounds that the victim was (believed to be) committing a felony, the court applied the common law as if the case involved two British subjects.

¹¹¹ Blackstone, *Commentaries*, Book IV, Chapter 14, p. 181; G. Walker, *Crime, Gender and Social Order in Early Modern England* (Cambridge, Cambridge University Press, 2003), p. 116. On the 'oracular status' of Blackstone's *Commentaries* in the British world, see W. Prest, 'Antipodean Blackstone: The *Commentaries* "Down Under"', *Flinders Journal of Law Reform* 6 (2) (2003), p. 159.

¹¹² Blackstone, *Commentaries*, Book IV, Chapter 16, p. 224.

¹¹³ *R. v. Hawker* [1822] NSWKR 4; [1822] NSWSupC 4, B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Division of Law Macquarie University), <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1822/r_v_hawker/> accessed 2 January 2012. See 'Note'.

¹¹⁴ *R. v. Hawker* [1822] NSWKR 4.

¹¹⁵ *R. v. Hawker* [1822] NSWKR 4.

In a climate of fear and hostility at the frontier, the judge advocate clearly perceived, however, that his ruling might be misinterpreted by some settlers as a licence to kill Aborigines. In reporting the reduction of the charge from wilful murder to manslaughter, and Hawker's ultimate acquittal, the *Sydney Gazette* emphasised that the judge advocate 'wished it to be properly and lastingly impressed upon the minds of all' that, as British subjects, 'the aboriginal natives have as much right to expect justice at the hand of the British Law, as Europeans'.¹¹⁶

R. v. Jamieson [1827] further illustrates the likelihood of an acquittal in cases where Aborigines were killed by settlers. In spite of a coroner's verdict of 'justifiable homicide', John Jamieson junior was 'indicted for manslaughter, in killing an aboriginal native called *Hole-in-the-book*', and brought before the Supreme Court of New South Wales in May 1827.¹¹⁷ Local Aborigines had implicated *Hole-in-the-book* for the murder of one of Jamieson's servants; in his defence, Jamieson claimed that he shot *Hole-in-the-book* while attempting to arrest him. Witnesses asserted that *Hole-in-the-book* spoke English and knew 'very well' why he was being arrested.¹¹⁸ Nonetheless, they testified, he ignored Jamieson's warning that he 'would certainly shoot' if the Aboriginal man attempted to flee.¹¹⁹

In summing up the evidence against Jamieson, Mr Justice Stephen informed the court that the question for the jury to determine was 'whether there was sufficient ground for the prisoner to entertain a belief that a felony had been committed by the deceased', for, 'if so, then he was authorize[d] in law to resort to force in order to prevent his escape'.¹²⁰ Jamieson's case provides a contemporary example of the type of 'recognised excuse or justification'

¹¹⁶ *R. v. Hawker* [1822] NSWKR 4.

¹¹⁷ *R. v. Jamieson* [1827] NSWSupC 31, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/r_v_jamieson/> accessed 2 January 2012. Original emphasis.

¹¹⁸ *Sydney Gazette*, 18 May 1827, p. 2.

¹¹⁹ *Sydney Gazette*, 18 May 1827, p. 2.

¹²⁰ *Sydney Gazette*, 18 May 1827, p. 2.

which could be used to refute a charge of manslaughter.¹²¹ In Tibbs' case, the law report gives no indication of the type of justification Pedder had in mind when he directed the jury to consider 'how far' the defendant 'was justified' in shooting at Jackson.¹²²

No public comment from the chief justice as trial judge or from the attorney-general as prosecutor links Tibbs' case to frontier violence between settlers and Aboriginal people.¹²³ Indeed, speaking at a public meeting in 1830, former attorney-general, J.T. Gellibrand, cautioned private citizens against committing 'acts' for which they might have to answer in court.¹²⁴ Recalling that in the mid-1820s 'a very strong feeling existed in respect to the atrocities that had been committed upon the blacks', he asserted 'without fear of contradiction' that

if any man who had killed a black native had been brought [to court] under such a charge ... the Attorney-General would have brought him before the Chief Justice for murder, and ... the Judge would have directed the Jury to find him guilty.¹²⁵

Now offering his private legal opinion, Gellibrand reminded colonists that 'in the present state of the law' anyone shooting an Aboriginal person whose identity as an aggressor was not certain could find himself charged with murder.¹²⁶ Despite his assurances, there would be no case in which a colonist was tried for killing an Indigenous person. Tibbs' case was not the exception.

¹²¹ Walker, *Crime, Gender and Social Order*, p. 115; M. Sornarajah, 'Reckless murder in Commonwealth law', *International and Comparative Law Review Quarterly* 24 (1) (1975), p. 848.

¹²² *Hobart Town Gazette*, 28 May 1824, 2.

¹²³ *Hobart Town Gazette*, 28 May 1824, p. 2.

¹²⁴ *Colonial Times*, 24 September 1830, 3.

¹²⁵ *Colonial Times*, 24 September 1830, 3.

¹²⁶ *Colonial Times*, 24 September 1830, 3; cf. Jamieson's acquittal of the manslaughter of an Indigenous person specifically identified as having committed a felony. It is important to note that the situation in Van Diemen's Land was also complicated by political and legal arguments around the culpability of settlers involved in Aboriginal killings during the operation of martial law.

The colonial press was also silent on any link between Jackson's death and settler-indigenous conflict. As the editors of the resumed series of *Historical Records of Australia* point out, reports of recent Aboriginal attacks on Europeans at the frontier were published in the same editions of the *Hobart Town Gazette* as reports relating to Jackson and Tibbs.¹²⁷ On 23 January 1824, for example, on the same page as a notice of the inquest into Jackson's death, the *Gazette* reported that a 'party of Natives' had killed a stockman in the Midlands.¹²⁸ Similarly, on 6 August 1824, the *Gazette* reported that 'a tribe of no less than two hundred Natives had made their appearance' at the Eastern Marshes, where a stock-keeper named John Doyle was speared.¹²⁹ In the same column, it recounted that 'another poor fellow has been speared by [resistance leader] Musquito [*sic*] at Pitt Water'.¹³⁰ These reports appeared on the same page as Tibbs' sentence to three years' transportation. Editorialising in the same edition that 'The many recent unfortunate deaths of stockmen afford the sad example of the imprudence of molesting the Natives',¹³¹ it is, as Chapman and Jetson argue, 'almost inconceivable' that the *Gazette* should have made no connection between Tibb's crime and recent frontier attacks, had his victim been an Aboriginal man.¹³²

Most striking, perhaps, is the absence of gubernatorial comment. A month after hearings began in the Supreme Court of Van Diemen's Land, Lieutenant-Governor Arthur reiterated the terms of earlier proclamations, publicly declaring 'his Determination, that if ... any Person ... shall be charged with firing at, killing, or committing any act of Outrage or Aggression, on the Native People, they shall be prosecuted for the same before the Supreme Court'.¹³³ Arthur's proclamation is dated four weeks after Tibbs' case came before the Supreme Court for trial. By contrast, a government notice dated

¹²⁷ HRA III, IX, pp. 795-796.

¹²⁸ *Hobart Town Gazette*, 23 January 1824, p. 2.

¹²⁹ *Hobart Town Gazette*, 6 August 1824, p. 2.

¹³⁰ *Hobart Town Gazette*, 6 August 1824, p. 2.

¹³¹ *Hobart Town Gazette*, 6 August 1824, p. 2.

¹³² HRA III, IX, p. 796. My thanks to Tim Jetson and Peter Chapman for drawing their doubts about Jackson's Aboriginality to my attention.

¹³³ *Hobart Town Gazette*, 25 June 1824, p. 1. For Jack and Dick's case, see section 8.3.

13 September 1826 was gazetted within days of the execution for murder of two Indigenous men, known as Jack and Dick.¹³⁴ This notice expressed in clear terms Arthur's 'hope' that the 'Example' of their execution

may tend, not only to Prevent the Commission of similar Atrocities by the Aborigines, but to induce towards them the Observance of a conciliatory line of Conduct, rather than harsh or violent Treatment ; the latter being but too likely to produce Measures of Retaliation, which have their Issue in Crime and Death.¹³⁵

Had Tibbs' case provided an example of the consequences under criminal law of 'harsh or violent Treatment' of the Aborigines, it is unlikely to have passed unremarked. Indeed, as Melville asserted in 1836, '[I]f example had been required, how much more advisable would it have been to have commenced by the trial and execution of some of the wholesale murderers of the aborigines'.¹³⁶

I suspect there is a different type of political explanation for the scheduling of Tibbs' case as the first to come before the new Supreme Court, and it has more to do with the agenda of the attorney-general than colonial race relations. Labouring 'under the painful necessity of laying before the Court a heavy catalogue of crimes and misdemeanours',¹³⁷ the attorney general probably chose to begin the first criminal sessions with a straightforward case. A coroner's jury having already returned a verdict of manslaughter against Tibbs, it would have been unusual for the military jury of the Supreme Court to dispute the original verdict.¹³⁸ Moreover, in a penal colony with no representative assembly, the new Supreme Court provided a unique public forum. So, despite a pressing and 'awful catalogue of crime', Gellibrand took the opportunity to eulogise the opening of a 'Court ... which

¹³⁴ *Hobart Town Gazette*, 16 September 1826, p. 4.

¹³⁵ *Hobart Town Gazette*, 16 September 1826, p. 4; Melville, *History of Van Diemen's Land*, p. 58.

¹³⁶ Melville, *History of Van Diemen's Land*, p. 59.

¹³⁷ *Hobart Town Gazette*, 28 May 1824, p. 2.

¹³⁸ cf. *R. v. Jamieson* [1827]. On 18 May 1827, the *Australian* reported that, 'The trial caused a good deal of interest, mingled with a portion of surprise, that the charge of manslaughter should have been preferred against Mr Jamieson ... after a Coroner's Jury had returned a verdict of justifiable homicide'.

secures the rights and privileges of the subject, as one of the proudest [days] the Colony has ever known'.¹³⁹ As the column inches devoted to Gellibrand's speech indicate, his lengthy encomium on the 'boons' of trial by jury resonated with both liberal newspaper editors and their readers, and was not to be overshadowed by the hearing of a contentious criminal case on 24 May 1824.¹⁴⁰

Conclusions

Since 1836, historians of Van Diemen's Land have agreed that no European faced criminal prosecution in the colony's superior court for offences against the island's Indigenous people. In other historical genres, however, Tibbs' case has recently become the focus of a counter-narrative in which the trial of an English convict for the manslaughter of a 'black man' is read as a significant example of settler-indigenous legal relations and the disinterested application of the law. Paradoxically, the assumption that Tibbs' victim was Indigenous obscures what might be a genuine example of the impartial administration of justice, for the case certainly appears to demonstrate the early nineteenth-century 'imperial assertion that the Empire recognised no distinction on the basis of colour or race' in matters of common law.¹⁴¹ The case is also a reminder that the distinction at this point was not between white and black, but between settler and Indigene.

This chapter illustrates that existing glosses on the case hang on anachronous assumptions about race and the language of racial identification during the early colonial period. Their solidly national(ist) focus also obscures the circuits of empire which carried people of colour throughout the wider

¹³⁹ *Hobart Town Gazette*, 28 May 1824, p. 2.

¹⁴⁰ *Hobart Town Gazette*, 28 May 1824, pp. 2-3. Almost two full columns were devoted to Gellibrand's speech. By contrast, the report of six cases over three days of sittings received only half a column under the heading, 'Trials'. *R. v. Tibbs* was the only case heard on 24 May 1824. The campaign for trial by civilian jury would become a significant political issue in Van Diemen's Land.

¹⁴¹ Lake and Reynolds, *Drawing the Global Colour Line*, p. 5. On the colour-blindness of English law, see also H. Reynolds, *The Law of the Land* (Ringwood, Penguin Books, 1992), p. 1.

British colonial world. In light of a growing body of evidence for the multi-racial colonisation of Australia, John Jackson's identity as a non-indigenous black man is not extraordinary. More remarkable is the confidence with which some commentators have woven an unsupported narrative around this fictive Indigene. Jackson's identification as an American man of colour has fatal implications for analyses which claim that Tibbs' case involves the killing of an Indigenous person. Consequent assertions that Chief Justice Pedder's hearing of the case reveals anything of his judicial attitudes towards the Aboriginal people of Van Diemen's Land are similarly invalidated.

CHAPTER 8

INDIGENOUS PRISONERS IN THE SUPREME COURT: PEDDER'S
JUDICIAL DENIAL OF ABORIGINAL SOVEREIGNTY

Between 1824 and 1826, Chief Justice Pedder presided over the trial and capital sentencing of four Indigenous men linked to the killings of convict stock-keepers at the colonial frontier. On 1 December 1824, Mosquito and Black Jack faced charges of 'aiding and abetting in the wilful murder' of William Holyoake and Mammoa in the Oyster Bay district.¹ Mosquito was found guilty of aiding and abetting in the murder of Holyoake, but acquitted of the second charge. Black Jack was acquitted of both charges, but capitally convicted for a separate murder at a third trial in January 1825.² He was executed with Mosquito at a public hanging in Hobart Town Gaol at the end of February.³ In May 1826, two Oyster Bay men nicknamed Jack and Dick were arraigned 'for the wilful murder' of Thomas Colley.⁴ Jack was convicted of the murder, while Dick was found guilty of aiding and abetting.⁵ Press criticism of the first trials appears to have gained some concessions for Jack and Dick. Chief Justice Pedder appointed counsel and an interpreter to assist, but the two men were found guilty on a black-letter reading of the law, and executed in September.

Within the national(ist) frame of Australian legal history, the cases against Mosquito and Black Jack, and Jack and Dick are read as having little

¹ R. v. Musquito and Black Jack [1824], B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_musquito_and_black_jack/> accessed 1 January 2012.

² Black Jack was convicted of the 1824 murder of Patrick McCarthy at Sorell Plains near the River Ouse at a third trial on 21 January 1825. 'Return of Outrages committed in the District of Bothwell by the Aborigines', Archives Office of Tasmania (hereafter AOT) CS01/1/316/7578, f. 800, reel Z1825; AOT SC45/1/1 Register of prisoners discharged by proclamation, case no. 69, ff. 37a-38, reel Z225.

³ *Hobart Town Gazette*, 25 February 1825, p. 2.

⁴ R. v. Jack and Dick [1826], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/sctas/html/r_v_jack_and_dick_1826.htm> accessed 1 January 2012.

⁵ R. v. Jack and Dick [1826].

precedential value. Overshadowed by the authoritative New South Wales judgement in *R. v. Murrell and Bummaree* [1836],⁶ which asserted the '*terra nullius* doctrine for Australian law',⁷ the Van Diemen's Land prosecutions have not been interrogated from a jurisprudential perspective. Yet, *R. v. Mosquito and Black Jack* [1824] and *R. v. Jack and Dick* [1826] provide vital case studies for assessing settler-indigenous legal relations in Van Diemen's Land at a time when settler jurisdiction to try cases involving Indigenous people was still being contested in the Supreme Court of New South Wales. Indeed, no Indigenous person was tried for murder in the parent colony until 1827.⁸

Information about the trials contained in press law reports and extant court documents reflect the law's focus on outcomes: were the defendants convicted or acquitted, and how they were punished? Constrained by common-law rules of evidence, the case law also tells a narrowly legalistic story. Privileging the forensic evidence, J.M. Bennett gives no indication in his fleeting reference to the trials that the Supreme Court's jurisdiction to try Indigenous people was uncertain. Begging the question, he contends that

⁶ *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35, B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Published by the Division of Law Macquarie University), <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/> accessed 2 January 2012.

⁷ On the mythologising aims of nationalist Australian legal history, see B. Attwood, *Telling the Truth about Aboriginal History* (Sydney, Allen & Unwin, 2005), p. 134. Murrell's case asserted the jurisdiction of the Supreme Court of New South Wales to try Indigenous people in all cases, included cases *inter se*. See also *R. v. Bonjon* [1841], heard in the Port Phillip District, *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bonjon/> accessed 1 January 2012. B. Kercher, 'Recognition of Indigenous legal autonomy in nineteenth-century New South Wales', *Indigenous Law Bulletin* 4 (13) (1998), p. 7; and '*R v Ballard, R v Murrell, and R v Bonjon*', *Australian Indigenous Law Reporter* 3 (3) (1998), p. 410.

⁸ While Indigenous people had previously been charged with theft and rape, Tommy was the first to be tried and executed for the murder of a colonist in New South Wales. *R. v. Tommy* [1827] NSWSupC 70, *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/r_v_tommy/> accessed 1 January 2012; L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, Mass., Harvard University Press, 2010), p. 169.

Pedder 'had to entertain' the prosecutions.⁹ In an approach which similarly obscures Pedder's judicial agency, Alex Castles' brief, anti-imperial gloss on the trials portrays the chief justice as the benign instrument of imported legal principles and the policy decisions of Lieutenant-Governor Arthur.¹⁰ This kind of whiggish legal history narrative presents the assertion of settler sovereignty over Aboriginal people in the Australian colonies as the resolution of a legal anomaly. Through the lens of settler colonial studies and comparative colonial legal history, Pedder's facilitation of the Van Diemen's Land trials can be read in a very different way.

In her paradigm-shifting analysis of the series of tentative iterations of colonial authority in early national Georgia and colonial New South Wales before 1836, Lisa Ford demonstrates that 'Perfect settler sovereignty rested upon the conflation of sovereignty, jurisdiction and territory'.¹¹ In the early nineteenth-century, Anglophone settler polities at the periphery of empire agitated for local autonomy on many fronts; defining Indigenous violence as crime became the 'central site of settler sovereignty'.¹² Ford draws our attention to the inconsistent articulation of territorial jurisdiction by colonial judges before the mid-1830s.¹³ Operating in the 'shadow of North American pluralism', for example, Chief Justice Forbes regarded Aboriginal legal status in New South Wales as a matter for the legislature, not the courts.¹⁴ While allowing the prosecution of some offences committed by or against Indigenous people, Forbes consistently refused to hear cases involving Indigenous violence *inter se*.¹⁵ In contrast, then, to earlier practices of

⁹ J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), pp. 68, 126. Bennett touches only briefly on *R. v. Jack and Dick* [1826]; *R. v. Mosquito and Black Jack* [1824] is relegated to an endnote.

¹⁰ S. Petrow, and K. Ramsey (eds.), A.C. Castles, *Lawless Harvests or God Save the Judges: Van Diemen's Land 1803-55, A Legal History* (Melbourne, Australian Scholarly Publishing, 2003), pp. 147-149, 151.

¹¹ Ford, *Settler Sovereignty*, p. 2.

¹² Ford, *Settler Sovereignty*, p. 208.

¹³ Ford, *Settler Sovereignty*, pp. 202-203.

¹⁴ Ford, *Settler Sovereignty*, pp. 197-198.

¹⁵ See, for example, *R. v. Ballard or Barrett* [1829] NSWSupC 26; sub nom. *R. v. Dirty Dick* (1828) NSW Sel Cas (Dowling) 2, *Decisions of the Superior Courts of New South Wales*,

recognising Indigenous jurisdiction and customary law in some circumstances, the performance of settler sovereignty through territorial jurisdiction over Indigenous crime against settlers, as well as violence *inter se*, was 'something quite radical'.¹⁶

In asserting his jurisdiction to try Indigenous people for crimes under English law within territorial spaces defined by colonists as 'settled districts', Chief Justice Pedder provides a local illustration of a 'revolution in jurisdictional practice' that was being played out in settler courts across the common-law world during the 1820s and early 1830s.¹⁷ Within this discursive context, Chapter 8 explores two key questions: why did Pedder facilitate the prosecution of Indigenous defendants in the face of unresolved questions around their amenability to English law? And, to what extent does Pedder's judicial denial of Aboriginal sovereignty, implicit in the trial and execution of the four Indigenous men under English law, challenge scholarly constructions in which the chief justice is cast as a champion of the Aboriginal people of Van Diemen's Land?

The absence of a sustained legal history analysis of the trials contributes to an artificial impression that Pedder had no choice but to hear the cases. Yet, law officers in New South Wales had already identified serious legal, ethical and practical impediments to the trial of Indigenous people and had recommended or deployed alternatives to criminal prosecution. From Judge-Advocate Atkins' legal opinion of 1805, that it was not practicable to try Indigenous people under English law, to Mr Justice Dowling's refusal to hear a murder case without an interpreter in 1828, section 8.1 maps judicial responses to the linguistic, cultural and procedural barriers to Indigenous prosecution in the colonial courts. The cases of Tommy, Binge Mhulto, and

<http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_ballard_or_barrett/> accessed 1 January 2012.

¹⁶ Ford, *Settler Sovereignty*, p. 2; R. v. Ballard or Barrett [1829] NSWSupC 26; sub nom. R. v. Dirty Dick (1828) NSW Sel Cas (Dowling) 2.

¹⁷ Ford, *Settler Sovereignty*, p. 160.

Bioorah illustrate that judges in New South Wales exercised their discretion to appoint interpreters, and even discharge Indigenous prisoners when the obstacles to a fair trial proved insurmountable.

Section 8.2 returns the focus to the Chief Justice Pedder and the Supreme Court of Van Diemen's Land. Opposition pressman Henry Melville records that the trial and execution of Mosquito and Black Jack in 1824 was 'looked upon by many as a most extraordinary precedent'.¹⁸ Predating the first Indigenous murder prosecution in New South Wales by almost three years, Mosquito and Black Jack's case can be read as an 'innovative' judicial response to Indigenous-settler collision.¹⁹ This section explores a legal construction of the charges against Mosquito and Black Jack, and the procedural context of their trial, to illustrate how settler jurisdiction was asserted through their prosecution.

The trial of Jack and Dick in 1826 suggests that Pedder's judicial attitude to Indigenous prosecution did not alter following the execution of Mosquito and Black Jack. Framed by readings of international law, sophisticated critiques in the opposition press challenged the assertion of settler jurisdiction to try Jack and Dick. By contrast, the legalism of Pedder's own report on the trial reveals that he saw the case in very narrow terms. Highlighting the tendency of the forensic evidence to occlude the broader contest for territorial authority, section 8.3 underscores how the proceedings were predicated upon Jack and Dick's constructed status as felons.

8.1 Precedents from the parent colony

In 1805, New South Wales Judge-Advocate, Richard Atkins, advised Governor King that 'the Natives of this Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as

¹⁸ G. Mackaness (ed.), Henry Melville, *The History of Van Diemen's Land from the Year 1824 to 1835 inclusive, During the Administration of Lieutenant-Governor George Arthur* (Sydney, Horwitz, 1965; originally published London, Smith and Elder, 1836), p. 39.

¹⁹ Ford, *Settler Sovereignty*, p. 2.

Evidences'.²⁰ Aboriginal people were regarded as being 'within the pale of H.M. protection';²¹ however, significant practical barriers precluded full Indigenous participation in the settler legal system. 'How', Atkins asked, 'can a Native, when brought to trial, plead Guilty or Not Guilty to an Indictment, the meaning and tendency of which they [*sic*] must be totally ignorant?'²²

Atkins' concern about the capacity of Indigenous people to understand a criminal indictment encompasses both linguistic and cultural dimensions. As William Blackstone explains in his *Commentaries on the Laws of England*, the indictment 'is to be read to [the prisoner] distinctly in the English tongue ... that he may fully understand his charge'.²³ Blackstone's emphasis on reading the indictment in English reflects the practice of an earlier age, in which the vernacular was not the language of the courts.²⁴ The use of the English language in colonial courts was clearly problematic, however, even for those Indigenous people who had learned to speak the language of the colonisers.

In most jurisdictions, there was (and is) no common law right to an interpreter, but English courts did have a long tradition of employing interpreters for non-verbal and non-English-speaking witnesses and defendants.²⁵ The records of the Old Bailey indicate that interpreters were

²⁰ King to Camden, 20 July 1805, Enclosure 2, 'Judge-Advocate Atkins' Opinion on the Treatment of Natives, 8 July 1805', *HRA* I, V, p. 502. Richard Atkins served in the Court of Criminal Jurisdiction of New South Wales between 1796 and 1809. Derided by contemporaries for his dissolute habits and limited legal knowledge, Atkins is regarded by others as 'humane' and 'sensitive'. B. Kercher, 'The New South Wales journal of Richard Atkins', *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/scnsw/html/atkins_intro.htm> accessed 24 January 2010. For a discussion of how Atkins' racialised thinking informed his legal opinion, see also K. Harman, 'Aboriginal convicts: Race, law and transportation in colonial New South Wales', unpublished PhD thesis, University of Tasmania, 2008, pp. 11-14.

²¹ *HRA* I, V, p. 503.

²² *HRA* I, V, p. 503.

²³ W. Blackstone, *Commentaries on the Laws of England* (Oxford, The Clarendon Press, 1765-1769), Book 4, Chapter 25, p. 318.

²⁴ Blackstone, *Commentaries*, Book 4, Chapter 25, p. 318. As Blackstone explains, the reading of the indictment in English 'was law, even while all other proceedings were in Latin'.

²⁵ J. Gibbons, *Forensic Linguistics: An Introduction to the Language of the Justice System* (Oxford, Blackwell Publishing, 2003), p. 238.

used with deaf and/or mute defendants and witnesses from 1725.²⁶ During the nineteenth century, interpreters were also employed to assist immigrants from non-English-speaking backgrounds in one *per cent* of Old Bailey trials.²⁷ Most famously, in the year John Lewes Pedder was called to the bar in London, multiple interpreters were employed in the trial of Queen Caroline in the House of Lords.²⁸ The type of ‘intralingual interpretation’ of cultural connotations requested during the Queen’s trial was (and is) not usually sought in a court setting, despite its obvious utility in cases involving defendants from diverse cultural backgrounds.²⁹

In the Supreme Court of New South Wales, *R. v. Tommy* [1827] demonstrates the difficulty of employing a capable translator who could also to be sworn as a competent witness.³⁰ In what Kris Harman has characterised as ‘an act of colonial ventriloquism’, a European was sworn as interpreter while an Indigenous person actually translated.³¹ In cases where no interpreter was available, colonial judges could also choose to dismiss cases against Indigenous people. In 1828, for example, Binge Mhulto was arraigned for the ‘wilful murder of a European’ at the remote district of Moreton Bay [in

²⁶ C. Stone and B. Woll, ‘Dumb O Jemmy and others: Deaf people, interpreters and the London courts in the eighteenth and nineteenth centuries’, *Sign Language Studies* 8 (3) (2008), p. 227.

²⁷ C. Emsley, T. Hitchcock and R. Shoemaker, ‘A population history of London: The demography of crime’, *Proceedings of the Old Bailey*, <<http://www.oldbaileyonline.org/static/Population-history-of-london.jsp>> accessed 13 January 2010.

²⁸ The German-born queen had lived in Italy since her separation from the king, and many witnesses were German or Italian. George IV’s attempt to divorce his wife on the grounds of adultery was pursued via a *Bill of Pains and Penalties* in the House of Lords because the king’s ‘own well-known infidelities’ prevented an appeal to the ecclesiastical courts. L. Davidoff and C. Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780-1850* (London, Routledge, 2002), p. 150.

²⁹ R. Morris, ‘The moral dilemmas of court interpreting’, *The Translator: Studies in Intercultural Communication* 1 (1) (1995), p. 28. Modern commentators on the common law emphasise that monolingual judges and lawyers are still notoriously unaccommodating of people from non-English-speaking backgrounds. K. Laster and V. Taylor, *Interpreters and the Legal System* (Sydney, The Federation Press, 1994), pp. 89-90; and Morris, ‘The moral dilemmas of court interpreting’, p. 28.

³⁰ *R. v. Tommy* [1827] NSWSupC 70.

³¹ Harman, ‘Aboriginal convicts’, pp. 64, 99-100, 352. Missionary, Rev Lancelot Threlkeld, and Aboriginal men, Bungaree and Biraban (also known as John McGill), regularly acted as interpreters in New South Wales.

present-day Queensland].³² Unable to 'speak a word of English', Binge Mhulto could neither understand the charge against him nor 'set up ... a satisfactory defence'.³³ In the absence of 'persons ... who are conversant with the dialect of the Moreton Bay blacks, and who might have been used as interpreters on the occasion', Mr Justice Dowling adjourned the case until an interpreter could be found.³⁴ 'Looking at this case, in any point of view', he informed the court, 'I am clearly of opinion, that if I were to try this savage, in his utterly defenceless situation, I should be at once departing from the spirit and letter of the British law'.³⁵

In other cases, the court discharged Indigenous defendants who spoke English, but lacked sufficient cultural literacy to understand their prosecution: in the language of the time, they were not yet 'civilised'. In 1816, for example, Daniel Mow-watty was charged with rape; a second 'native', named Bioorah, was charged with 'being present and accessory to the offence'.³⁶ As Harman highlights, Bioorah's Aboriginality – referred to in court as the 'peculiar circumstances in which he stood' – posed as much of an obstacle to his trial proceeding as the absence of 'sufficient cause' in the depositions against him.³⁷ While Bioorah was said to understand English 'tolerably well', the judge-advocate recognised that he did not understand settler legal and social customs, and ordered him to be discharged before the trial.³⁸ By contrast, his Indigenous co-accused, who had lived among the settlers since childhood and possessed 'unusual ... cultural, moral, physical

³² R. v. Binge Mhulto (1828) Sel Cas (Dowling) 1; [1828] NSWSupC 82, *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1828/r_v_binge_mhulto/> accessed 1 January 2012.

³³ R. v. Binge Mhulto (1828) Sel Cas (Dowling) 1; [1828] NSWSupC 82.

³⁴ R. v. Binge Mhulto (1828) Sel Cas (Dowling) 1; [1828] NSWSupC 82.

³⁵ R. v. Binge Mhulto (1828) Sel Cas (Dowling) 1; [1828] NSWSupC 82.

³⁶ R. v. Mow-watty [1816] NSWKR 2; [1816] NSWSupC 2, *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1816/r_v_mowwatty/> accessed 1 January 2012.

³⁷ R. v. Mow-watty [1816] NSWKR 2; [1816] NSWSupC 2; Harman, 'Aboriginal convicts', p. 93.

³⁸ R. v. Mow-watty [1816] NSWKR 2; [1816] NSWSupC 2.

and legal affinities with the colonial community', was considered competent to be tried and executed.³⁹ As Lisa Ford and Brent Salter highlight, it was not Mow-watty's residence in the territory defined as New South Wales but his 'peculiar proximity to the new colonial state' that 'brought him within the purview of British law'.⁴⁰

Atkins' focus on the capacity of Indigenous people to understand an indictment and formally answer the charge reflects the procedural requirement for prisoners to enter a plea 'before Evidence can be adduced against them'.⁴¹ In Blackstone's explanation, a plea of 'general issue' (not guilty) was necessary to allow the facts of a case to be put before the court.⁴² Any mitigating factors, such as self-defence or provocation, could then be argued in evidence. Indigenous defendants were regularly excluded, however, from giving evidence or calling other Indigenous witnesses to testify in their defence. Based on its 'customary function ... as a deterrent to perjury',⁴³ the swearing of an oath was essential to render a witness competent. The law draws a distinction between competency and credibility and, while English and colonial courts recognised the broader competency of adherents of non-Christian religions, they could not accommodate the *viva voce* testimony of individuals whose religious beliefs were incompatible with swearing a binding oath.⁴⁴ As Atkins had advised in 1805, the 'evidence of

³⁹ R. v. Mow-watty [1816] NSWKR 2; [1816] NSWSupC 2; Harman, 'Aboriginal convicts', pp. 92-93; K.V. Smith, 'Moowattin, Daniel (c. 1791-1816)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/AS10349b.htm>> accessed 20 January 2010.

⁴⁰ L. Ford and B. Salter, 'From pluralism to territorial sovereignty: The 1816 trial of Mow-watty in the superior court of New South Wales', *Indigenous Law Journal (Toronto)* 7 (1) (2008), p. 69.

⁴¹ *HRA* I, V, p. 503.

⁴² Blackstone, *Commentaries*, Book 4, Chapter 26, p. 332. After 1827, a plea of not guilty was automatically entered for a prisoner who refused to plead, under the provisions of 7 & 8 Geo. IV, c. 28, *An Act for Improving the Administration of Justice in Criminal Cases in England*, s. 2.

⁴³ N. Wright, 'The problem of Aboriginal evidence in early colonial New South Wales' in D. Kirkby and C. Coleborne (eds.), *Law, History and Colonialism: The Reach of Empire* (Manchester, Manchester University Press, 2001), p. 140.

⁴⁴ The English precedent was established in the Court of Chancery by *Omichund v Barker* (1744). Courts in Van Diemen's Land administered oaths to Jews, Muslims and Hindus, among the many non-Christian inhabitants of the island. The Chinese practice of breaking a

Persons not bound by any moral or religious Tye can never be ... construed as legal evidence'.⁴⁵ As 'heathens', Indigenous people who had not converted to religious traditions recognised by the court were therefore ineligible to testify.

In view of the many impediments to a fair trial, Atkins advised that it 'would be a mocking of Judicial Proceedings, and a Solecism of Law' to proceed against Indigenous defendants.⁴⁶ Significantly, Atkins' advice to Governor King was framed in response to a specific request for his legal opinion on the practicability of trying Mosquito – an Aboriginal man Pedder considered fit to stand trial in the Supreme Court of Van Diemen's Land nineteen years later.⁴⁷ In 1805, the Governor of New South Wales accepted Atkins' view that he was unable to try Mosquito under English law. Wishing 'to cause Justice being [*sic*] done to Natives as well as the Settlers', he pursued another solution: exile to Norfolk Island.⁴⁸

In the three decades after Atkins' opinion, the criminal courts of New South Wales grappled with their jurisdiction to prosecute individuals who could not be regarded as fully competent legal actors. As the cases against Tommy, Binge Mhulto, and Bioorah demonstrate, colonial courts recognised that Indigenes who lacked sufficient language proficiency and cultural literacy could not properly understand or defend a criminal charge. During this period, only a handful of Aboriginal people who, like Mow-watty, had become 'civilised' through lengthy contact with the settler community, were considered competent to stand trial. Highlighting the continuing uncertainty over whether settler jurisdiction was 'determined by territory or tempered

saucer was also recognised as legally binding. R.S. Willen, 'Religion and the law: The secularization of testimonial procedures', *Sociological Analysis* 44 (1) (1983), pp. 58-59.

⁴⁵ *HRA* I, V, p. 502.

⁴⁶ *HRA* I, V, p. 504.

⁴⁷ Mosquito and his compatriot, Bull Dog, had been implicated in several murders of white settlers in the Hawkesbury region of New South Wales. King to Camden, 20 July 1805, *HRA* I, V, p. 497. Both men were banished to Norfolk Island.

⁴⁸ King to Camden, 20 July 1805, *HRA* I, V, p. 497; N. Parry, "'Hanging no good for blackfellow": Looking into the life of Musquito' in I. Macfarlane and M. Hannah (eds.), *Transgressions: Critical Australian Indigenous Histories* (Acton, ANU E Press, 2007), p. 156.

by personal status',⁴⁹ other Indigenous defendants, unfamiliar with settler 'social schemas', were discharged by the courts.⁵⁰

From a procedural perspective, Atkins' legal opinion also emphasises the obligations of court officers to act 'according to Law'.⁵¹ In New South Wales 'members of the Court of Judicature' had 'sworn "to give a true Verdict according to the *evidence*"'.⁵² Given the obstacles to Indigenous testimony, this evidence was likely to be one-sided. Moreover, Atkins argued, 'Penal Laws' could not be 'stretched' to suit the political exigencies of 'making Public Examples of the Offending Natives'.⁵³ Practical difficulties and the putative status of Aboriginal people as British subjects notwithstanding, as Mr Justice Dowling articulated in *Binge Mhulto's* case, Indigenous defendants were 'entitled to all the privileges and protection which the British law affords to its own immediate subjects'.⁵⁴ Where these could not be guaranteed, law officers in New South Wales appear to have favoured the spirit rather than the letter of the law.

Bruce Kercher points out that the 'great paucity' of colonial law reporting means that these New South Wales cases were not necessarily well known.⁵⁵ It is unclear whether Chief Justice Pedder sought advice on how to proceed in cases involving Indigenous defendants. He did, however, make general use of newspaper law reports of other cases in New South Wales. In 1825, for example, Pedder 'very heartily' thanked the governor for his 'kindness, in sending me the *Sydney Gazette*, alluding to the decision reported to have been

⁴⁹ Ford, *Settler Sovereignty*, p. 167.

⁵⁰ Gibbons, *Forensic Linguistics*, pp. 1, 9.

⁵¹ *HRA* I, V, p. 503.

⁵² *HRA* I, V, p. 503. Original emphasis.

⁵³ *HRA* I, V, p. 503.

⁵⁴ *R. v. Binge Mhulto* (1828) Sel Cas (Dowling) 1; [1828] NSWSupC 82.

⁵⁵ B. Kercher, 'Recovering and reporting Australia's early colonial case law: The Macquarie Project', *Law and History Review* 18 (3) (2000), p. 660; and cf. *R. v. Peter* [1860], in which the absence of formal law reports 'led to the court searching around for any living person (such as Redmond Barry, who had been defence counsel for Bonjon in 1841) who might remember and be able to testify about ... earlier decisions'. F. Cahir and D. Clark, 'The case of Peter Mungett: Born out of the allegiance of the Queen, belonging to a sovereign and independent tribe of Ballan', *Provenance* 8 (2009), p. 3.

made in Davidson's case'.⁵⁶ He is also known to have corresponded with the Chief Justice of New South Wales on other judicial matters during the 1820s.⁵⁷

When Mosquito and Black Jack appeared before in the Supreme Court in 1824, Van Diemen's Land was still an administrative dependency of New South Wales, with rights of appeal to the superior court in Sydney. Legal opinion and case law from the parent colony contested the prosecution of 'uncivilised' Aborigines, both for reasons of equity and conformity with common-law rules. Judicial practice in Sydney provided alternatives to trial when these requirements could not be met. With no apparent concession to the disadvantages identified by Atkins and Dowling, Pedder's decision to hear the case against Black Jack and Mosquito – an Aboriginal man previously deemed unfit for trial – raises intriguing questions about his judicial view of the legal status of Indigenous people in Van Diemen's Land, and his decisive role in criminalising their resistance to colonisation.

8.2 R. v. Mosquito and Black Jack [1824]: a 'most extraordinary precedent'

Press law reports and extant court records do not problematise Pedder's jurisdiction to try Indigenous defendants, nor do they indicate that any legal argument around their liability to settler authority was ventilated in court. On 10 June 1824, Chief Justice Pedder discharged the first Indigenous prisoner brought before the Supreme Court of Van Diemen's Land. The *Hobart Town Gazette* reported that a 'poor black native boy, named Troy, was arraigned for house-breaking'.⁵⁸ The case against him was dismissed, however, before the trial began. Significantly, Troy's reprieve came not because he was Indigenous, but because 'no witness appeared to support the

⁵⁶ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, Mitchell Library (hereafter ML) ZA 2169, reel MAV/FM4/ 3671.

⁵⁷ Pedder refers to 'consulting Mr Forbes by letter'. Pedder to Wilmot Horton, private, 13 September 1825, CO 280/4, f. 272a, AJCP reel PRO 231.

⁵⁸ *Hobart Town Gazette*, 11 June 1824, p. 3.

prosecution'.⁵⁹ Six months later, the prosecution of Mosquito and Black Jack set a Van Diemen's Land precedent.

Slow to discern a pattern of Indigenous resistance, colonial officials responded to settler anxiety about Indigenous aggressors by equating identifiable leaders with the convict banditti, whose depredations terrified settlers in the interior in the mid-1820s. As with the bushrangers, rewards were offered for the apprehension of Mosquito and Black Jack, and military parties and blacktrackers were deployed.⁶⁰ In February 1824, the Superintendent of Police in Hobart Town issued warrants for the arrest of Mosquito and Black Jack 'on the oath of John Radford', and a reward of 'One hundred Dollars Each' was offered by the governor.⁶¹ In mid-August, Mosquito was arrested near Oyster Bay by two settlers and an Indigenous youth named Tegg, who had 'volunteered to go out for the purpose'.⁶² How and when Black Jack was captured remains unclear.⁶³

A transported convict in his twenties, John Radford was the only survivor of an attack in which fellow stock-keepers, William Holyoake and Mammoa, were allegedly killed with spears. As he informed the court, 'I am, and for six years have been a stock-keeper on the [stock] run of Mr Cylus [sic] Gatehouse, at Grindstone Bay'.⁶⁴ Approximately 225 km from Hobart Town, Gatehouse's farm was located within the territory of the Oyster Bay people, at a seasonal camping place known to them as WALE.LE.LA.BAC.KEN.NER.⁶⁵

⁵⁹ *Hobart Town Gazette*, 11 June 1824, p. 3; AOT SC45/1/1 Register of prisoners discharged by proclamation, f. 7, reel Z225.

⁶⁰ B. Madley, 'From terror to genocide: Britain's Tasmanian penal colony and Australia's History Wars', *Journal of British Studies* 47 (1) (2008), pp. 86-87; and A.G.L. Shaw (ed.), John West, *The History of Tasmania* (Sydney, Angus and Robertson, 1981; originally published Launceston, Henry Dowling, 1852), pp. 48, 58, 82.

⁶¹ AOT NS323/1/1 Diary of Adam Amos, 15 March 1824.

⁶² *Hobart Town Gazette*, 20 August 1824, p. 2.

⁶³ West records only that he 'subsequently taken'. West, *The History of Tasmania*, p. 268.

⁶⁴ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁶⁵ L. Ryan, *The Aboriginal Tasmanians* (Sydney, Allen & Unwin, 1996), pp. 16-17; N.J.B. Plomley (ed.), *Friendly Mission: The Tasmanian Journals and Papers of George Augustus Robinson, 1829-1834* (Hobart, Tasmanian Historical Research Association, 1966), p. 347.



Figure 15: Gatehouse's hut at Grindstone Bay, as shown in a section from 'Survey of a part of the E. coast, Van Diemen's Land by Thomas Scott, Asst. Sury. Genl.', 1821, Mitchell Library, State Library of NSW [M2 881.3/1821/1].

Image reproduced courtesy of the Mitchell Library, State Library of New South Wales

A law report published in the *Hobart Town Gazette* reproduces Radford's account of the attack at some length. In testimony offered to the Supreme Court on 1 December 1824, Radford narrated that William Holyoake – a teenage convict returning from the Colonial Hospital in Hobart Town to his master, George Meredith, at Great Swanport – arrived at Gatehouse's hut 'on a Wednesday between the 10th and the 15th' of November 1823.⁶⁶ Unable to travel any further, the convalescent 'begged permission to remain a day or two' at the hut with Radford and his 'fellow servant' Mammoa.⁶⁷ The

⁶⁶ *Hobart Town Gazette*, 3 December 1824, p. 3; AOT NS323/1/1 Diary of Adam Amos, 21 September and 20 November 1823. Meredith was one of a handful of colonists who obtained substantial land grants in the area. G. Calder, *Levée, Line and Martial Law: A History of the Dispossession of the Mairremmener People of Van Diemen's Land, 1803-1832*. Studies in the History of Aboriginal Tasmania, vol. 2 (Hobart, Fullers Bookshop/University of Tasmania, 2010), p. 147.

⁶⁷ *Hobart Town Gazette*, 3 December 1824, p. 3; AOT NS323/1/1 Diary of Adam Amos, 20 November 1823.

following morning, a party of 'about 65' Aboriginal people arrived at the hut. Led by Mosquito and Black Jack,⁶⁸ the 'mob' was travelling through the Oyster Bay district on seasonal migration. Court records indicate that the formal charge of aiding and abetting murder was directed to Mosquito and Black Jack 'and divers others unknown'.⁶⁹ Indeed, Radford acknowledged that most of the mob were unknown to him. He was 'positive', however, 'as to the persons of Mosquito and Black Jack'.⁷⁰ Radford confirmed that he knew both men by name, but clarified that 'I never heard the prisoner called "Black Jack," but simply "Jack." I call him Black Jack from his colour'.⁷¹

In Radford's narrative, relations between the two groups were initially friendly. Mosquito and Black Jack both spoke some English, and Radford testified that he had several conversations with them.⁷² Mosquito reassured the stock-keepers that they and their stock would not be speared, and Radford shared 'bread and meat' with him, when he 'begged for some provision'.⁷³ On Friday, Mosquito took breakfast and supper with Radford. He also 'handled the musket', one of two guns hanging in the stock-keepers' hut.⁷⁴ Somewhat inexplicably in Radford's account, the mood suddenly changed the next morning. While Radford and Holyoake were watching a corroboree in a nearby stock-yard and Mammoa was on 'the other side of the creek' talking to some Aboriginal people, the stock-keepers' fire arms were removed from their hut.⁷⁵ The two groups of Aboriginal people then

⁶⁸ The two men were recognised as 'co-leaders' of the 'tame mob'. Their English nicknames also indicate that their interaction with the colonists was relatively frequent. R. Cox, *Steps to the Scaffold: The Untold Story of Tasmania's Black Bushrangers* (Pawleena, Cornhill Publishing, 2004), pp. 3, 5; Ryan, *The Aboriginal Tasmanians*, pp. 17-19.

⁶⁹ AOT SC45/1/1 Register of prisoners discharged by proclamation, case no. 43, ff. 30a-31, reel Z225.

⁷⁰ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁷¹ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁷² *Hobart Town Gazette*, 3 December 1824, p. 3.

⁷³ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁷⁴ *Hobart Town Gazette*, 3 December 1824, p. 3. The other gun was a 'small fowling piece' [shotgun], which could fire ball or shot.

⁷⁵ *Hobart Town Gazette*, 3 December 1824, p. 3. In evidence, Radford described the group of 'natives' as 'playing ... 150 yards from the hut'. He later recalled that, 'On Saturday morning [they] were having a corroboree [*sic*], dancing and singing'. Cox, *Steps to the Scaffold*, p. 27.

converged 'by the hut door, so that ... the whole body was assembled'.⁷⁶ Nearby, five dogs belonging to the stock-keepers were 'tied to a stump'; Mosquito untied the dogs and led them away, despite Mammoa's protests.⁷⁷ To stop Radford 'interfering' with the removal of the dogs, the 'whole body' of Aborigines 'raised their spears with the points directed to' the stock-keepers.⁷⁸

Telling Holyoake that the 'best thing we could do was to run away ... otherwise we should be killed', Radford fled, with the younger man following.⁷⁹ The 'invalid' Holyoake was unable to keep up, however.⁸⁰ Radford claimed that he stopped to pull a spear from Holyoake's back, but then 'continued running' until he heard Holyoake 'cry "O my God! the black-fellows have got me!"'⁸¹ Having narrowly escaped with his life, Radford fled south to his master's home at Pitt Water [Sorell].⁸² Returning to Grindstone Bay ten days later with Gatehouse and his neighbour, George Wise, Radford found Holyoake's body 'covered with sticks' and 'some spears broken in it'.⁸³

Holyoake was not the only man supposed to have been speared that day. Mosquito and Black Jack were arraigned on a second charge of 'aiding and

⁷⁶ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁷⁷ *Hobart Town Gazette*, 3 December 1824, p. 3. Indigenous people readily adopted imported dogs into their lifestyle and, like the colonists, relied on them for hunting and protection. J. Boyce, 'Canine revolution: The social and environmental impact of the introduction of the dog to Tasmania', *Environmental History* 11 (1) (2006), pp. 110-111, 114, 115.

⁷⁸ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁷⁹ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸⁰ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸¹ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸² NS323/1/1 Diary of Adam Amos, 20 November 1823; L. Ryan, 'Abduction and multiple killings of Aborigines in Tasmania: 1804-1835', *Genocide Studies Project Working Paper No. 35* (2007), p. 9, <<http://www.yale.edu/gsp/colonial/index.html>> accessed 21 January 2010. One of the largest east coast landholders by 1821, Silas Gatehouse (d. 1854) was an absentee landlord, residing at Pitt Water [Sorell]. AOT Correspondence File, Gatehouse family; G.T. Stilwell, 'Gatehouse, George (1778?-1838)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://www.adb.online.anu.edu.au/biogs/A010396b.htm>> accessed 21 January 2010.

⁸³ *Hobart Town Gazette*, 3 December 1824, p. 3.

abetting in the wilful murder of Mammoa', an 'Otaheitean [*sic*']'.⁸⁴ Radford's testimony on this charge was not reproduced in the *Gazette*. As the editor remarked, his evidence 'scarcely varied from that which he had given in the previous trial', so that a 'repetition of it would be superfluous'.⁸⁵ Additional testimony was provided by George Wise, who deposed that 'from information received of the ... murder [of Holyoake], he ... accompanied ... Mr Gatehouse, ... from Pitt Water to Grindstone Bay'.⁸⁶ Having discovered Mammoa's body 'in a pool of water', Wise 'counted 37 wounds about the body, which he supposed to have been given by spears'.⁸⁷ Under cross-examination by the chief justice, however, Wise admitted that the information he received about the attack had 'induced him to suppose the wounds had been inflicted by spears'; he could not positively 'distinguish them from wounds inflicted by gun shot'.⁸⁸ In light of this ambiguity, Mosquito and Black Jack were acquitted of any involvement in Mammoa's death.

In order to understand how Radford's claim, that Mosquito and Black Jack were among about sixty unidentified Indigenous people at Grindstone Bay when the two stock-keepers were killed, was reconfigured as the capital offence of aiding and abetting murder, it is necessary to filter his testimony through the common-law thinking which generated the charge. In a recent assessment of the process of jury instruction, Chris Heffer charts the shift required of lay jurors from 'reasoning in a narrative mode' – based on the story-like testimony of witnesses – to a 'logico-scientific mode' in which a legal construction is overlaid on a 'narrative base'.⁸⁹ For the historian, as for the juror, this is a vital shift. As Heffer explains, the legal construction of a specific case is introduced with the reading of the indictment. It is later 'explicitly detailed in the judge's instructions to the jury', which form part of

⁸⁴ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸⁵ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸⁶ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸⁷ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸⁸ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁸⁹ C. Heffer, 'The language and communication of jury instruction' in J. Gibbons and M.T. Turell (eds.), *Dimensions of Forensic Linguistics* (Amsterdam/Philadelphia, John Benjamins Publishing Company, 2008), pp. 47-49.

the summing up.⁹⁰ While the prosecution's opening address is reduced to the brief statement that the 'Attorney-General described the facts, and called John Radford', the law report in the *Hobart Town Gazette* replicates the language of the (now lost) indictment, stating that Mosquito and Black Jack were charged as 'principals in the second degree'.⁹¹ Extant sources provide no indication of how the chief justice instructed the jury in his summing up of the case against Mosquito and Black Jack. As in other cases, however, Pedder is likely to have invoked Blackstone's *Commentaries on the Laws of England*.⁹²

A contemporaneous case in the Supreme Court of New South Wales elucidates the relevant point of law, as outlined in Chief Justice Forbes' instructions to the jury in *R. v. Minton* [1824]. Following the murder of her husband by two other men, Mary Minton appeared before the court on a charge of being '*present, aiding and abetting* at the fact; or, as the Law terms it, a principal in the second degree'.⁹³ Forbes drew on Blackstone's *Commentaries* to clarify the meaning of present: 'From the nature of the charge', he informed the jury,

it is necessary that the accused should have been present; but such presence need not be actual, such as would make her an eye or an ear witness; if she were constructively present, such as by taking some part assigned her in the common act, she is as guilty in the estimate of the Law, as if she were immediately engaged.⁹⁴

So, the law recognised two 'degrees' of participation: where someone was 'a principal, in the first degree', they were the 'absolute perpetrator of the crime'.⁹⁵ In the 'second degree', they were 'present, aiding, and abetting the fact to be done'.⁹⁶ Blackstone cites the example of someone keeping watch

⁹⁰ Heffer, 'The language and communication of jury instruction', p. 49.

⁹¹ *Hobart Town Gazette*, 3 December 1824, p. 3.

⁹² See, for example, Pedder's evocation of Blackstone to distinguish manslaughter from murder in *R. v. Brumby* [1827]. *Colonial Times*, 19 January 1827, p. 4; Blackstone, *Commentaries*, Book 4, Chapter 14, p. 192.

⁹³ *R. v. Minton* [1824] NSWSupC 16, *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1824/supreme_court/r_v_minton/> accessed 1 January 2012. Original emphasis.

⁹⁴ *R. v. Minton* [1824] NSWSupC 16.

⁹⁵ Blackstone, *Commentaries*, Book 4, Chapter 3, p. 34.

⁹⁶ Blackstone, *Commentaries*, Book 4, Chapter 3, p. 34.

‘from a convenient distance’ while another ‘commits a robbery or murder’.⁹⁷ A classic modern example would be the get-away driver in an armed robbery. The doctrine of constructive presence emphasises the ‘common purpose’ of a group of individuals committing a particular offence, and does not require all of them to be physically present.⁹⁸ Indeed, Chief Justice Pedder’s report on the trial is clear that it was ‘one of the said other persons whose names are as yet unknown’, who used ‘certain wooden spears of no value’ to inflict the ‘divers mortal wounds’ from which Holyoake died.⁹⁹

Reading the historical evidence, Naomi Parry argues that it is ‘not clear whether [Mosquito] “aided and abetted” the Aborigines’ because he was ‘only lightly armed with a waddy’ and played no ‘leadership role’ in the attack.¹⁰⁰ By contrast, a legal construction of the evidence, as Pedder understood it, reveals that these factors were not relevant to proving the charge of aiding and abetting murder. On a black-letter reading of the law, Mosquito and Black Jack were constructively present, and found guilty as charged. As this section demonstrates, reading the case law through the lens of the common-law thinking behind the indictment provides new insights into Pedder’s handling of the trial. By unpacking the doctrine of constructive presence, to clarify the charges as Pedder directed the jury to understand them, non-legal historians are better able to interpret the forensic evidence and discern the mechanics of criminalising Indigenous resistance.

An Indigenous perspective on the spearings is notably absent from the evidence presented to the court. Lyndall Ryan concludes that the attack resulted from the breakdown of ‘reciprocal arrangements over the seasonal exchange of Aboriginal women and the use of food resources’ in the summer

⁹⁷ Blackstone, *Commentaries*, Book 4, Chapter 3, p. 34.

⁹⁸ G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Sydney, The Federation Press, 2002), p. 90.

⁹⁹ AOT MM71/1/7 Chief Justice’s reports on prisoners capitally convicted, Tasmanian Archival Estrays in Dixon Library: Governor’s Office and judges’ reports, 1823-1839, ff. 128, 130, reel Z3234.

¹⁰⁰ Parry, ‘Hanging no good for blackfellow’, p. 159.

of 1823/24.¹⁰¹ Ryan's interpretation provides valuable context for the initially friendly contact between the two groups. Radford's testimony indicates that Mosquito did bring several women to the stock-keepers' hut; he also received food from the stock-keepers. Radford's assertion, that neither he nor 'the deceased' had 'offered any offence, or wanted to take any liberties' with the Indigenous women, came in rebuttal of a specific question from a jury man.¹⁰² Information about any arrangement that might have existed between the two groups was not volunteered to the court.¹⁰³

Radford's further assertion, that 'no provocation was given to the natives, or any violence shown', is clearly contradicted by 'hearsay' evidence recorded in the field journal of George Augustus Robinson.¹⁰⁴ Travelling on the east coast in January 1831 on his 'Friendly Mission', Robinson was accompanied by a party of convict escorts and Indigenous people, including a young Oyster Bay man known as Black Tom. At Grindstone Bay, the party came across graves which 'contained the bodies of two white men killed by the natives': one of the men, Robinson says, 'was killed by Mosquito and Black Jack'.¹⁰⁵

At the graveside, Black Tom recounted to Robinson the harrowing event he had witnessed there seven years before:

Tom said he was stopping at this hut with the mob and as one of the women was walking away, they fired a quantity of small shot into her back which made a wound as broad as his hand. Tom said it was as cruel a thing as he ever saw done.¹⁰⁶

Robinson's rendering of Tom's eye-witness account directly challenges Radford's exculpatory testimony, and provides primary source evidence for a

¹⁰¹ Ryan, 'Abduction and multiple killings of Aborigines in Tasmania', pp. 8-9. Alternatively, Calder speculates that the attack on the stock-keepers was part of an 'established practice of attempting to expel the alien "beings" from their country'. Calder, *Levée, Line and Martial Law*, p. 152

¹⁰² *Hobart Town Gazette*, 3 December 1824, p. 3.

¹⁰³ *Hobart Town Gazette*, 3 December 1824, p. 3.

¹⁰⁴ *Hobart Town Gazette*, 3 December 1824, p. 3.

¹⁰⁵ Journal of George Augustus Robinson, 13 January 1831, Plomley, *Friendly Mission*, p. 347.

¹⁰⁶ Journal of George Augustus Robinson, 13 January 1831, Plomley, *Friendly Mission*, p. 347.

specific motive which is missing from the law reports and existing interpretations of the killings.

In the absence of local legal opinion or case law on the question, Pedder's authority to try Indigenous prisoners rested on the legal fiction of settler sovereignty. Paul McHugh argues that the 'notion of a "colony" itself represented a complete juridical entity'.¹⁰⁷ Asked to rule in *R. v. Lowe* [1827] on the Supreme Court's 'jurisdiction to try a British subject for an alleged offence, committed against [an] aboriginal native' in New South Wales, Chief Justice Forbes determined that the question was non-justiciable.¹⁰⁸ 'How far it is proper to pass an act, taking in these territories ... and establishing therein our own rules and ordinances', His Honour determined, 'is a question not for us to entertain'.¹⁰⁹ Instead, Forbes declared, 'If the Act of Parliament [4. Geo. IV, c. 96] has recognised a sovereignty over this country, and recognised the application of English law here, we must look to the British law as established here *de facto*; and the Court is of that opinion'.¹¹⁰ Settler jurisdiction over Indigenous people was not similarly challenged in the Supreme Court of Van Diemen's Land.

When Tommy faced trial in Sydney in 1827, no other Indigenous person had been charged with murder.¹¹¹ Noting a shift away from the previous policy of non-prosecution, the *Monitor* declared that, 'Up to the present date ... we had always concluded, that our Chief Justice [Forbes] and [attorney-general]

¹⁰⁷ P. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford, Oxford University Press, 2005), p. 6.

¹⁰⁸ Lieutenant Nathaniel Lowe of the 40th Regiment was charged with the murder of an Indigenous prisoner held in his custody. See *R. v. Lowe* [1827] NSWKR 4; [1827] NSWSupC 32, *Decisions of the Superior Courts of New South Wales*, <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/r_v_lowe/> accessed 1 January 2012.

¹⁰⁹ *R. v. Lowe* [1827] NSWKR 4; [1827] NSWSupC 32.

¹¹⁰ *R. v. Lowe* [1827] NSWKR 4; [1827] NSWSupC 32. This principle was reconfirmed by the High Court of Australia in *Mabo*, which held that, while municipal courts cannot challenge the validity of the Crown's acquisition of sovereignty, they 'must determine the body of law which is in force in the new territory'. *Mabo and Ors v State of Queensland and Ors (No 2)* (1992) 175 CLR 1, para 31-32, <http://www.austlii.com/au/cases/cth/high_ct/175clr1.html> accessed 9 February 2010.

¹¹¹ *R. v. Tommy* [1827] NSWSupC 70; Ford, *Settler Sovereignty*, p. 162.

Mr Bannister, had mutually agreed on the unconstitutionality of the position, that the Heathen tribes of New Holland were in respect of murder subject to British law'.¹¹² It is significant, then, that Chief Justice Pedder chose to facilitate the prosecution of Mosquito and Black Jack almost three years earlier, without publicly articulating the principles on which the trial proceeded. Pedder's report and the press law report give no indication that he was asked to rule on the court's jurisdiction to try Mosquito and Black Jack. Melville's criticism that 'Both these Aborigines underwent the ordeal of trial twice in one day, and without counsel' highlights a key factor: the absence of defence counsel meant that no formal objection to the trial was put to the bench.¹¹³

Historically, defence counsel was appointed by the court, 'whether requested by the prisoner or not', when a judge anticipated that arguments about the legality of proceedings or other points of law were likely to be raised.¹¹⁴ The original conception of defence counsel as more closely resembling an *amicus curiae* was reflected in their limited role before the passage of the *Prisoners' Counsel Act* of 1836.¹¹⁵ At the time of Mosquito and Black Jack's case, the presence of defence barristers remained a matter for judicial discretion, although judges at the Old Bailey in London were routinely appointing counsel by 1820.¹¹⁶ In the Supreme Court of Van Diemen's Land, Chief Justice Pedder more usually followed 'the well known principle of British law, that the Judge is in every case Counsel for the prisoner'.¹¹⁷ Indeed, even the

¹¹² *Monitor*, 29 November 1827, cited at R. v. Tommy [1827] NSWSupC 70.

¹¹³ Melville, *History of Van Diemen's Land*, p. 38.

¹¹⁴ D.J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Oxford, Clarendon Press, 1998), p. 46.

¹¹⁵ An *amicus curiae* (literally a friend of the court) is a disinterested adviser. Cairns, *Advocacy*, pp. 46-47, 181-182; 6 & 7 Will. IV, c. 114, *An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney* (1836).

¹¹⁶ C. Emsley, T. Hitchcock and R. Shoemaker, 'Trial procedures: The role of lawyers', *Proceedings of the Old Bailey*, <<http://www.oldbaileyonline.org/static/Trial-procedures.jsp#lawyers>> accessed 19 January 2010.

¹¹⁷ *Tasmanian*, 7 April 1832, cited at R. v. Cam and Denner [1832], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1832/r_v_cam_and_denner/> accessed 1 January 2012.

anti-government *Colonial Times* conceded that, 'In criminal cases, the pains and patience which he exhibits, in searching every charge brought before him to the very bottom, being really, as he is legally supposed to be, the Counsel for the accused, are above all praise'.¹¹⁸

Pedder's decision not to appoint counsel for Mosquito and Black Jack in this first case involving Indigenous defendants suggests that he did not foresee – or did not wish to entertain – any challenge to the legitimacy of the trials. That he was willing to review the court's jurisdiction to try particular offences is evident, however, from cases involving British defendants. When questions arose in 1825, for example, about the 'applicability of Lord Ellenborough's Act to this colony', the chief justice informed Governor Arthur: 'I must confess to my everlasting sorrow, that I have passed sentence in two cases & suffered an execution to take place in one of them ... without looking into the act itself'.¹¹⁹ There 'are such doubts on the point', he continued, 'that it would have been my duty to take all possible care to prevent execution till the opinion of the law officers of the Crown in England could have been obtained'.¹²⁰ Yet, in cases involving Indigenous defendants, Pedder does not appear to have sought the opinion of law officers in London or Sydney.

In his role as 'Counsel for the accused', the chief justice elicited information which seemed unfavourable to Black Jack. His presence at Gatehouse's hut was confirmed by Radford, who recognised Black Jack by his physical characteristics. He was seen 'in the hut' on Saturday morning, and spoke English 'quite well'.¹²¹ On the other hand, Pedder's cross-examination of George Wise was crucial to securing the acquittal of both Mosquito and Black

¹¹⁸ *Colonial Times*, 26 May 1826, p. 2.

¹¹⁹ 43 Geo. III, c. 53, commonly referred to as *Lord Ellenborough's Act* (1803). Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169. These cases were heard within weeks of the trial of Mosquito and Black Jack; the two British offenders were executed with them in February 1825. *Hobart Town Gazette*, 25 February 1825, pp. 2-3.

¹²⁰ Pedder to Arthur, 9 April 1825, Arthur Papers, vol. 9, ML ZA 2169.

¹²¹ *Hobart Town Gazette*, 3 December 1824, p. 3.

Jack on the second charge, for Wise was compelled to acknowledge that Mammoa's wounds could have been inflicted by gunshot rather than spears.¹²² Pedder's advocacy could not save the two Indigenous men from the gallows, however.

Under the common-law system, questions of fact are determined by the jury, not the judge. On the limited evidence presented to the Supreme Court, a military jury found Mosquito guilty of aiding and abetting the murder of Holyoake.¹²³ Black Jack was acquitted of both charges, but found guilty of the murder of another stock-keeper at a third trial on 21 January 1825.¹²⁴ At a judgment day on 15 February 1825, both men were sentenced 'to be hanged'.¹²⁵ Ten days later, the two Indigenes ascended the scaffold with six European prisoners.¹²⁶ Emphasising their constructed status as common-law criminals, the official execution narrative published in the *Hobart Town Gazette* briefly acknowledged their Aboriginality, but did not otherwise distinguish Mosquito and Black Jack from the six other 'hapless offenders'.¹²⁷

8.3 R. v. Jack and Dick [1826]: a 'second legal outrage'

Colonial historian Henry Melville recounts that 'much difference of opinion' had arisen 'as to the propriety, and even the legality of the trial and execution' of Mosquito and Black Jack.¹²⁸ A 'second legal outrage', against Jack and Dick, therefore attracted additional public scrutiny.¹²⁹ Reflecting a strong 'populist element in colonial legal discourse',¹³⁰ opposition pressmen

¹²² *Hobart Town Gazette*, 3 December 1824, p. 3.

¹²³ *Hobart Town Gazette*, 3 December 1824, p. 3.

¹²⁴ 'Black Jack and o[the]rs' were charged with the murder of 'Patrick Macarty' at Sorell Plains. AOT SC45/1/1, case no. 69, ff. 37a-38, reel Z225; MM71/1/7, ff. 147-148, reel Z3234; CS01/1/316/7578 'Return of Outrages committed in the District of Bothwell by the Aborigines', f. 800, reel Z1825.

¹²⁵ AOT SC45/1/1, case nos. 43 and 69, ff. 30a-31, 37a-38, reel Z225. Predating the proclamation of the Executive Council of Van Diemen's Land in December 1825, the sentences were not subject to local review.

¹²⁶ *Hobart Town Gazette*, 25 February 1825, p. 2.

¹²⁷ *Hobart Town Gazette*, 25 February 1825, p. 2.

¹²⁸ Melville, *History of Van Diemen's Land*, p. 56.

¹²⁹ Melville, *History of Van Diemen's Land*, p. 58.

¹³⁰ McHugh, *Aboriginal Societies and the Common Law*, p. 32.

evoked international law – and its founding principle, the doctrine of sovereignty – to challenge the justice of proceeding against Indigenous people. Sympathetic editors questioned whether Aboriginal sovereignty had been extinguished ‘by the hoisting of the English flag, and ... other mummeries of the same description’.¹³¹ In contrast to Pedder’s judicial determination of 1825 that Van Diemen’s Land was a colony by settlement,¹³² opposition pressmen argued that the colony had been acquired by conquest.¹³³ Under international law, they reminded readers, the suitability of Indigenous customary law for the conquering settler society was not relevant to the justice of its recognition.

A second line of argument rejected populist, dehumanising constructions of Indigenous people.¹³⁴ Challenging racialised conceptions of human development,¹³⁵ in which the Indigenous inhabitants of Van Diemen’s Land were ‘so degraded in the scale of humanity’ as to be ‘little better than “*feræ naturæ*”’,¹³⁶ the opposition *Colonial Times*, for example, took this argument to its logical conclusion to demonstrate that it ‘would almost be as just to subject any other description of wild animal to the operation of the British Law!’¹³⁷

¹³¹ *Colonial Times*, 2 June 1826, p. 3.

¹³² *R. v. Magistrates of Hobart Town* [1825], <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_magistrates_of_hobart_town/> accessed 1 January 2012.

¹³³ On colonies acquired by settlement or conquest, see A.C. Castles, *An Introduction to Australian Legal History* (Sydney, Law Book Company, 1982), pp. 3, 6-10. Ambiguous at first, the notion that New South Wales was a colony by settlement was consolidated during the nineteenth century, and the position finally established in the Privy Council in *Cooper v. Stuart* (1889). H. Reynolds, *The Law of the Land* (Ringwood, Penguin Books, 1992), pp. 34-35, 44-45.

¹³⁴ K. Anderson, *Race and the Crisis of Humanism* (London and New York, Routledge, 2007), pp. 36-42, 75.

¹³⁵ Enlightenment stadial theory asserted that human beings progressed along a continuum from savagery, via barbarism, to civilisation. The dominant monogenist paradigm of the early nineteenth century held that all human beings were created from a single source (the Judæo-Christian God) and were capable of being ‘civilised’ to a greater or lesser extent. Anderson, *Race and the Crisis of Humanism*, pp. 23, 43, 59-61, 109.

¹³⁶ *Colonial Times*, 2 June 1826, p. 3. Animals said to be *feræ naturæ* are those ‘of a wild and untameable disposition; which any man may seize [*sic*] upon and keep for his own use or pleasure’. Blackstone, *Commentaries*, Book 2, Chapter 1, p. 14.

¹³⁷ *Colonial Times*, 2 June 1826, p. 3. Circumventing discussion of Pedder’s role in the case, Bennett asserts that the *Colonial Times* editorial ‘deemed the aboriginal people themselves to

Strikingly, such editorials did not directly censure the chief justice. While Hobart Town pressmen did not shrink from critiquing Pedder when he opposed settler interests, they generally adhered to the deferential tradition of court reporting which Peter King has identified in the London press during the late-eighteenth- and early nineteenth-centuries.¹³⁸ Transposed to Van Diemen's Land, King's observation that 'criticism of the bench is notable mainly by its absence' does, however, draw attention to the omission in press law reports of the Indigenous trials of the more usual effusive praise of a 'learned judge', who 'spared no pains' for the prisoners who came before him.¹³⁹ Perhaps the *Colonial Times* came closest to open criticism when it declared that 'We very much question the policy, to say the least, of ... proceeding' against Jack and Dick, and went on to express its hope that 'there are those here who will use their influence to prevent these poor creatures becoming victims to a breach of law which they understand not; and their responsibility to which is questionable by the very highest authority'.¹⁴⁰ Was this a veiled criticism, or an appeal to the chief justice?

Jack and Dick appeared before Chief Justice Pedder on 26 May 1826, when they were arraigned 'for the wilful murder of Thomas Colly [*sic*], a servant to Mr Hart, at Oyster Bay'.¹⁴¹ The convict stock-keeper had received a fatal spear-wound to the back on 15 March 1826 and died after 'languishing' for fourteen days.¹⁴² Pedder's anfractuous report on the case records that 'The Attorney General saith that ... Jack ... and Dick ... feloniously wilfully and of

be little better than animals *ferae naturae*'. This is a misreading of the editorial's position. Bennett, *Sir John Pedder*, p. 68.

¹³⁸ P. King, 'Newspaper reporting and attitudes to crime and justice in late-eighteenth- and early-nineteenth-century London', *Continuity and Change* 22 (1) (2007), pp. 98-99.

¹³⁹ King, 'Newspaper reporting', p. 99.

¹⁴⁰ *Colonial Times*, 2 June 1826, p. 3.

¹⁴¹ *Hobart Town Gazette*, 27 May 1826, p. 3; *Colonial Times*, 2 June 1826, p. 3; AOT SC45/1/1, case no. 158, ff. 89a-90, reel Z225. The victim's name is spelt Colley in official records. His conduct record states that, at 25, Colley was 'an old offender', transported for life in 1820. Conduct Record, Thomas Colley, AOT CON31/1/6, f. 109, reel Z2547, available online at <http://search.archives.tas.gov.au/ImageViewer/image_viewer.htm?CON31-1-6,358,114,L,80> accessed 6 March 2010. On 'turbulent' career of John de Courcy (Paddy) Hart in Van Diemen's Land, see *HRA* III, IX, pp. 798-799, Note 191.

¹⁴² AOT MM71/1/7, f. 190, reel Z3234.

their malice aforethought did kill and murder' the said Thomas Colley.¹⁴³ Jack was found to have speared Colley, while Dick was 'present aiding abetting helping comforting assisting and maintaining him' to commit the 'said Felony and Murder'.¹⁴⁴

Information about the Indigenous accused is fragmentary. Dick was said to be 'very old' and appeared 'to have been a chief'; Jack 'otherwise called Richard' was described as 'an interesting youth'.¹⁴⁵ Both men were members of the so-called 'tame mob', a group of Oyster Bay people who frequented a camp established and provisioned by the colonial government at Kangaroo Point [Bellerive], across the river from Hobart Town, between 1824 and 1826.¹⁴⁶ Jack and Dick were 'ascertained to be the perpetrators' of a 'barbarous Murder ... committed near Oyster Bay', and on their 'next return to [Kangaroo Point] ... were arrested on this charge'.¹⁴⁷

The *Colonial Times* reported that the trial of Jack and Dick 'lasted two days'.¹⁴⁸ Establishing what evidence was adduced against them, however, is hampered by limited extant court records and the brevity of law reports in the colonial press. Whereas a lengthy trial transcript was published in Mosquito and Black Jack's case, only a handful of references to the trial of Jack and Dick appeared in the capital's two weekly newspapers, the opposition *Colonial Times* and officially sanctioned *Hobart Town Gazette*.¹⁴⁹ Suggesting editorial sensitivity to the priorities of the government and its settler readership, the *Gazette* devoted considerably more attention to the

¹⁴³ MM71/1/7, f. 194, reel Z3234. On the 'syntactic anfractuosity' of legal English, see E. Alcaraz Varó, 'Legal translation' in J. Gibbons and M.T. Turell (eds.), *Dimensions of Forensic Linguistics* (Amsterdam/Philadelphia, John Benjamins Publishing Company, 2008), p. 101.

¹⁴⁴ MM71/1/7, ff. 190, 192, reel Z3234.

¹⁴⁵ *Colonial Times*, 5 May 1826, p. 3, and 15 September 1826, p. 3; *Hobart Town Gazette*, 16 September 1826, p. 15.

¹⁴⁶ West, *The History of Tasmania*, p. 271.

¹⁴⁷ AOT CBE1/1/1 Report of the Committee for the Care of Captured Aborigines to Lieutenant-Governor Arthur, 19 March 1830, f. 60, reel Z2744.

¹⁴⁸ *Colonial Times*, 2 June 1826, p. 3.

¹⁴⁹ *Hobart Town Gazette*, 27 May 1826, p. 3, and 3 June 1826, p. 2; *Colonial Times*, 2 June 1826, p. 3.

interruption 'towards evening' of the first day's hearing, when Assistant Surgeon Seccombe was called away from the jury box to attend 'a handsome red haired' regimental musician, who had been injured with a knife and whose life was now 'despaired of'.¹⁵⁰ A week after the trial (in its next edition), the *Gazette* summarised two days of hearings with the remark that, 'It appeared that the old man [Dick] concealed himself behind a fence, and watching his opportunity, speared his victim'.¹⁵¹ Contradicting this account, Pedder's report identifies Jack as the principal offender.¹⁵²

Unlike their compatriots, Mosquito and Black Jack, Jack and Dick were assisted in court by legal representation and an interpreter. Though highly critical of the legitimacy of the trial, Melville conceded that 'the Court' – meaning Pedder – 'appeared to be more considerate towards these poor ignorant creatures; for not only did the Chief Justice appoint counsel for them, but also, an interpreter was employed on the occasion'.¹⁵³ This shift in Pedder's judicial practice certainly raises questions about why he now chose to appoint counsel and an interpreter, when these concessions had not been extended to Mosquito and Black Jack. The presence of counsel and an interpreter can also be read as reinforcing the court's construction of Jack and Dick as ordinary felons, entitled to receive the same assistance as other non-English-speaking defendants in the common-law world.

Jack and Dick were represented by barristers, J.T. Gellibrand and Gamaliel Butler, who acted 'gratuitously'.¹⁵⁴ The law report and court records do not indicate how Gellibrand and Butler conducted their defence. As

¹⁵⁰ *Hobart Town Gazette*, 27 May 1826, p. 3, and 3 June 1826, p. 2.

¹⁵¹ *Hobart Town Gazette*, 3 June 1826, p. 2.

¹⁵² MM71/1/7, ff. 190, 192, reel Z3234.

¹⁵³ Melville, *History of Van Diemen's Land*, p. 56. cf. Lyndall Ryan has attributed this indulgence to Pedder's belief that Jack and Dick were the 'last of the "depredators"'. Ryan, *The Aboriginal Tasmanians*, p. 90.

¹⁵⁴ *Colonial Times*, 9 June 1826, p. 3. Admitted as a barrister in the Supreme Court in 1824, Butler also profited from Aboriginal dispossession, acquiring 'large properties far and wide' on the island. J.N.D. Harrison, 'Butler, Gamaliel (1783-1852)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University <<http://www.adb.online.anu.edu.au/biogs/A010175b.htm>> accessed 17 March 2010.

attorney-general, Gellibrand had prosecuted Mosquito and Black Jack on behalf of the colonial government in 1824. In other matters, Gellibrand had demonstrated his political independence by refusing to pursue prosecutions he considered 'improper for the Crown to bring'.¹⁵⁵ He does not appear to have disputed the legitimacy of prosecuting Indigenous people. Indeed, having indicted Mosquito and Black Jack in 1824, Gellibrand contributed to establishing a precedent for trying Indigenous people in the Supreme Court of Van Diemen's Land. Removed from the office of attorney-general in the interim, following a controversial commission of inquiry led by Pedder, Gellibrand acted as *pro bono* defence counsel for Jack and Dick in 1826. In spite of his antipathy to the colonial administration, he and Butler do not appear to have challenged the court's jurisdiction to proceed against their clients.

Trial reports provide no information on who acted as interpreter. As case law from New South Wales demonstrates, it would have been necessary to swear the adherent of a recognised religion to interpret in court. In the first two decades of colonisation, some settlers became fluent in Indigenous languages, but few (respectable) Europeans could speak local language by the mid-1820s.¹⁵⁶ Colonial chaplain, Robert Knopwood, had baptised many Aboriginal children into the Church of England, so it is conceivable that a 'civilised' Indigene was available to interpret for Jack and Dick – a role later taken on by the 'famous interpreter', Black Tom, in the Executive Council in 1828.¹⁵⁷

¹⁵⁵ P.C. James, 'Gellibrand, Joseph Tice (1792?-1837)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/gellibrand-joseph-tice-2088/text2621>> accessed 10 August 2011. James cites the example of Gellibrand's refusal to bring charges against newspaper editor, R.L. Murray, for maligning one of Governor Arthur's officers.

¹⁵⁶ J. Boyce, 'Journeying home: A new look at the British invasion of Van Diemen's Land, 1803-1823', *Island* 66 (1996), pp. 46-47.

¹⁵⁷ 'A Return of Baptisms, Marriages and Deaths within the District of Hobart Town, Van Diemen's Land, from 12th March 1804, to 21st December 1819', *HRA* III, III, p. 510; J. Boyce, *God's Own Country? The Anglican Church and Tasmanian Aborigines* (Hobart, Anglicare Tasmania, 2001), p. 26; M. Fels, 'Culture contact in the County of Buckinghamshire, Van Diemen's Land, 1803-1811', *Tasmanian Historical Research Association Papers and Proceedings* 29 (2) (1982), p. 65; Journal of George Augustus Robinson, 11 January 1830,

Implicitly questioning the need for an interpreter, the *Colonial Times* reported that both Jack and Dick were ‘apparently gifted with a superior understanding to what we have hitherto seen’.¹⁵⁸ In court, Dick ‘attempted to shew [*sic*] that he did not understand English, but’, the *Hobart Town Gazette* asserted, ‘the evidence proved that he could speak it with tolerable ease’.¹⁵⁹ After the trial it was reported that, ‘if any one spoke to [Jack] in a friendly manner, he would laugh and appear as cheerful as if he were with his sable brethren in the woods’.¹⁶⁰ As case law from New South Wales indicates, however, the level of cultural literacy required to understand court proceedings demands more than conversational English.

The colonial administration maintained that Jack and Dick were convicted ‘on the clearest evidence’.¹⁶¹ It is unclear from the extant sources precisely what evidence was adduced against them in court. Melville and West record only that convict stock-keepers gave evidence: where Melville condemns the court’s reliance on convict testimony, West perceives ‘no special reason for suspicion’ in this case.¹⁶² The only identifiable settler witness appears to have been Thomas Buxton (c. 1790-1865), a farmer and district constable who had lived in the Oyster Bay district since 1821.¹⁶³ A week before the trial the *Gazette* reported that ‘Master Buxton, who witnessed the murder, has come up to Town’.¹⁶⁴ Buxton’s respectable position within the colonial hierarchy placed him beyond contemporary scepticism about the credibility of convict witnesses. Nevertheless, in his hostility towards Indigenous people, Buxton is representative of many colonisers of varying civil status,

Plomley, *Friendly Mission*, p. 111; Melville, *History of Van Diemen’s Land*, p. 80n.

¹⁵⁸ *Colonial Times*, 5 May 1826, p. 3.

¹⁵⁹ *Hobart Town Gazette*, 3 June 1826, p. 2.

¹⁶⁰ *Colonial Times*, 15 September 1826, p. 3; Melville, *History of Van Diemen’s Land*, p. 58n.

¹⁶¹ CBE1/1/1 Report of the Committee for the Care of Captured Aborigines to Lieutenant-Governor Arthur, 19 March 1830, f. 60, reel Z2744.

¹⁶² Melville, *History of Van Diemen’s Land*, p. 57; West, *The History of Tasmania*, p. 271.

¹⁶³ Buxton also received his own land grant of 500 acres. National Library of Australia (hereafter NLA) MS 902 Thomas Buxton to his Father Mother and Sisters, 14 September 1821, ff. 4-5; L. Nyman, *The East Coasters: The Early Pioneering History of the East Coast of Tasmania* (Launceston, Regal Publications, 1990), pp. 17, 33, 195.

¹⁶⁴ *Hobart Town Gazette*, 20 May 1826, p. 2.

who came into direct conflict with Indigenous people at the frontier. Buxton's animosity and personal violence towards Oyster Bay people is revealed in two colonial sources: the first, a letter to his family in England; the second, a narrative of an Aboriginal raid which indicates that Buxton did more than merely witness Colley's spearing.

Employed to manage a 2,000-acre land grant at Oyster Bay for William Talbot in 1821, Buxton soon formed the opinion that the presence of 'vicious' local Indigenes was hindering colonisation of the district.¹⁶⁵ The 'Natives', he wrote to his family in Derbyshire, 'are very treacherous especially this tribe at our settlement'.¹⁶⁶ Of a chance encounter with two Indigenous men armed with spears, Buxton related, '[I] took good aim with my fowling piece loaded with buck shot', and gave one man a 'severe peppering on the buttocks ... I had the other barrel loaded with a Ball and could have shot either of them dead but I did not wish to kill either of them if I could make them run'.¹⁶⁷ Buxton's characterisation of the local Indigenous population as a dangerous obstacle to settler expansion, to be legitimately displaced with violence, typifies the chauvinist perspective of many settlers who gained substantial economic advantages from Indigenous dispossession.¹⁶⁸

Writing in 1837, Jorgen Jorgensen related (somewhat inaccurately) that Jack and Dick were 'executed for the murder of two of Mr Buxton's men at Little Swanport'.¹⁶⁹ A second colonial account also appears to locate Colley's spearing at Buxton's farm. In the 1870s, colonial historian James Bonwick published a narrative, attributed to 'one of Buxton's daughters', which

¹⁶⁵ NLA MS 902, ff. 1-3; *HRA* III, IV, p. 503.

¹⁶⁶ NLA MS 902, f. 3.

¹⁶⁷ NLA MS 902, f. 3.

¹⁶⁸ While in Hobart Town to give evidence at the trial, Buxton applied for a further grant of land on the basis that he had 'been robbed to a great extent by the Bushrangers and Natives, who have so diminished his property as to render it almost impossible for him to continue on the land he now possesses without assistance from some quarter'. AOT CSO1/1/150/3649 Memorial of Thomas Buxton, 22 May 1826, ff. 45-46, reel Z1787.

¹⁶⁹ N.J.B. Plomley, *Jorgen Jorgensen and the Aborigines of Van Diemen's Land: Being a Reconstruction of his 'Lost' Book on their Customs and Habits, and on his Role in the Roving Parties and the Black Line* (Hobart, Blubber Head Press, 1991), p. 74.

recounts a raid by Aboriginal people, in which Colley and other unnamed whites were allegedly speared.¹⁷⁰ Paralleling John Radford's account of the attack at Grindstone Bay in 1823, the (unnamed) Buxton daughter – who happened to be either Radford's wife or sister-in-law – recalled that relations between her family and the Indigenous people were initially cordial.¹⁷¹ Some of the men, she said, 'came across to the hut and said that all the party were tame Blacks ... meaning they were all peaceable'.¹⁷² They spoke English, and invited the Buxtons 'to come over to their camp, and have "a yarn"'.¹⁷³

Later that evening, however, the Buxton children saw the 'Natives showing signs of warfare', and warned their parents.¹⁷⁴ Several Indigenous men had stolen firearms and bread from the Buxton's hut. Thomas Buxton caught one of them red-handed, but the 'other [white] men were speared before they could get to the hut'.¹⁷⁵ Buxton then 'fired at' one of the Aborigines, and 'the Natives took their wounded man away'.¹⁷⁶ In a reprisal attack led by Buxton and neighbouring Europeans, 'several of the Blacks' were killed the following night.¹⁷⁷ Although posthumously incriminating her father for killing 'several' Indigenous people, Miss Buxton's narrative seeks to delegitimise Aboriginal resistance by emphasising settler vulnerability and the unpredictability of

¹⁷⁰ J. Bonwick, *The Lost Tasmanian Race* (London, Sampson Low, Son & Marston, 1870), p. 116. Bonwick states that a local doctor 'had been giving me an account of some ancient wrongs of the settlers, and appended this narrative to his letter, obtaining his information from the daughter of the gentleman who suffered from marauding violence'.

¹⁷¹ A muster of 1823 indicates that Thomas Buxton had three daughters who were old enough to have witnessed the raid. In 1833, Buxton's eldest daughter, Mary Ann, married John Radford, the convict stock-keeper on whose evidence Mosquito and Black Jack were convicted. NS323/1/1 Diary of Adam Amos, 19 October 1823, and 15 March 1824; Nyman, *The East Coasters*, p. 130; AOT Register of Marriages (pre Civil Registration), 1803-1830, RGD 36/1/1, Reg. No. 2119/1833, reel Z2451.

¹⁷² Bonwick, *The Lost Tasmanian Race*, p. 116.

¹⁷³ Bonwick, *The Lost Tasmanian Race*, p. 116. Another dimension to understanding their 'peaceable' intent is suggested in the nature of communication 'within the cultural space inhabited by Aboriginal people'. As Tasmanian Aboriginal writer, Greg Lehman, explains, "'Having a yarn" is ... governed by the protocols of respect, trust and companionship'. G. Lehman, 'Telling us true' in R. Manne (ed.), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (Melbourne, Black Inc., 2003), p. 175.

¹⁷⁴ Bonwick, *The Lost Tasmanian Race*, p. 116.

¹⁷⁵ Bonwick, *The Lost Tasmanian Race*, p. 117.

¹⁷⁶ Bonwick, *The Lost Tasmanian Race*, p. 117.

¹⁷⁷ Bonwick, *The Lost Tasmanian Race*, p. 117.

contact. Combined with contemporary newspaper reports, in which Aboriginal hostility was 'typically portrayed as criminality', the effect was, as Robert Foster puts it, to 'invert the reality of the frontier':¹⁷⁸ Indigenous people were depicted as 'invaders', while the colonisers were cast as 'stoical defenders of their isolated properties'.¹⁷⁹

'Hearsay' evidence from the field journal of George Augustus Robinson provides another perspective on the spearing. Prompted by the sight of Colley's grave at Grindstone Bay in 1831, Robinson's convict escort, William Stansfield, recalled that

[A] shepherd and a bullock driver named Thomas Colly [*sic*] were fellow servants and lived at one hut together. When Colly [*sic*] came home one night he saw the natives and Jack displeased him and he flogged him with the bullock whip.¹⁸⁰

Directly linking Colley's death to Jack's flogging, Stansfield told Robinson that, 'Later, when Paddy Hart was bringing [Colley] from Maria Island, they met [the natives]. Colly [*sic*] asked Jack if he knew him and he said he was the ---- that flogged him [...] Afterwards the natives killed him'.¹⁸¹ Convict records indicate that Colley was detained at the Maria Island penal settlement between August 1825 and his assignment to Hart on 13 March 1826.¹⁸² Stansfield had absconded from his employer in March 1825, so the flogging he witnessed must have occurred between March and August 1825.¹⁸³ Pedder's trial report indicates that Colley was speared on 15 March 1826,

¹⁷⁸ R. Foster, "'Don't mention the war': Frontier violence and the language of concealment', *History Australia* 6 (3) (2009), p. 68.5.

¹⁷⁹ Foster, 'Don't mention the war', p. 68.6.

¹⁸⁰ Stansfield was one of six convicts assigned to Robinson's party in December 1829. Journal of George Augustus Robinson, 13 January 1831, Plomley, *Friendly Mission*, pp. 107, 347.

¹⁸¹ Journal of George Augustus Robinson, 13 January 1831, Plomley, *Friendly Mission*, p. 347. Paddy Hart also 'heard this conversation' between Colley and Jack.

¹⁸² 'Maria Island Convict Register, 1825-1832' in B. Rieusset, *Maria Island Convicts, 1825-1832: An Account of the First Convict Settlement at Maria Island, Van Diemen's Land* (Hobart, B. Rieusset, 2007), pp. 42-43.

¹⁸³ Stansfield absconded from the service of Mr Roadknight on 4 March 1825, having been charged with sheep stealing. His name appears in the 'Runaway Notices' between March and November 1825. *Hobart Town Gazette*, 11 March 1825, p. 2S, and 26 November 1825, p. 2S.

within days of his return to the Oyster Bay district.¹⁸⁴ It is possible that he was speared in revenge for flogging Jack, as soon as he returned to Jack's country. That Colley was not killed outright also raises the possibility that the intention had been to wound him in accordance with Indigenous customary practices.

As with the case against Mosquito and Black Jack, reliance on the testimony of convicts or their employers meant that evidence of this kind of incendiary and unlawful violence was unlikely to have been adduced in court. The context provided by Stansfield's account of Jack's flogging implies that Colley was speared in retaliation for an earlier assault. This information was not available to the court, however. In the apparent absence of a motive for the attack on Colley, Pedder attributed the actions of Jack and Dick to 'not having the fear of God before them but being moved and seduced by the instigation of the Devil' – a construction routinely employed in criminal indictments in an age which conflated crime and sin.¹⁸⁵ Directed by the prosecutor and the judge to consider a legal construction of the evidence, the military jury was effectively required to exclude the impact of colonisation from its deliberations on questions of fact. The two Indigenous men were found guilty and sentenced 'to be severally hanged'.¹⁸⁶ Pedder's report went to the Executive Council for review on 7 September, but no pardon was granted and the minutes of meeting do not record the Councillors' deliberations on Jack and Dick's fate.¹⁸⁷ A week later, the two Indigenous men were hanged at Hobart Town Gaol.

¹⁸⁴ MM71/1/7, f. 190, reel Z3234.

¹⁸⁵ MM71/1/7, f. 190, reel Z3234; E.H. Sutherland, D.R. Cressey and D.F. Luckenbill, *Principles of Criminology* (11th edn.) (Oxford, General Hall, 1992), p. 68. The principal explanations for crime during the medieval and early modern periods were 'innate depravity' or the 'instigation of the devil'.

¹⁸⁶ *Colonial Times*, 2 June 1826, p. 3, and 8 September 1826, p. 4; *Hobart Town Gazette*, 3 June 1826, p. 2; AOT SC45/1/1, case no. 158, f. 90, reel Z225.

¹⁸⁷ AOT EC4/1/1 Minutes of proceedings of the Executive Council, 7 September 1826, ff. 78-80, reel Z1474. The 'Calendar of Prisoners Capitally Convicted being so large', the Executive Council met on 7, 8, 9, and 11 September 1826 to review the sentences of 37 prisoners.

Conclusions

A growing body of international scholarship in the fields of settler colonial studies and comparative colonial legal history proposes that the assertion of settler sovereignty in the Anglophone colonial world was a faltering and inconsistent process before 1836. As settler polities at the peripheries of empire sought to assert their autonomy from London, the criminalisation of Indigenous resistance to colonisation became the site for performing a local fusion of sovereignty, jurisdiction and territory. Significantly pre-dating the first Indigenous murder prosecution in the parent colony of New South Wales, Chief Justice Pedder's decision to proceed with the trials of Mosquito and Black Jack (1824) and Jack and Dick (1826) represents a 'revolutionary' judicial response to frontier conflict, which set a Van Diemen's Land precedent.

Informed by a legal construction of the charges against the four Indigenous men, this chapter demonstrates that Pedder took a narrowly legalistic attitude towards their prosecution. In contrast to law officers in New South Wales, who recognised the inherently disadvantaged position of Indigenous people in the courtroom, Pedder only belatedly conceded that Aboriginal defendants required the assistance of defence counsel and an interpreter. Pedder's decision not to appoint defence counsel in the trial of Mosquito and Black Jack meant that no legal objection to the court's jurisdiction to try Indigenous people was formally put to the bench. Having established a local precedent with the first trial in 1824, Pedder tried Jack and Dick in 1826 as if their prosecution was also unproblematic.

In part, the assertion of settler sovereignty which underpins these trials was territorial: identified examples of Indigenous-settler violence occurring within zones defined by the colonial authorities as 'settled districts' were reconfigured as criminal offences under English law. The personal intimacy of Mosquito and Black Jack, and Jack and Dick with the colonisers – implied by their English nicknames and their familiarity with settlers and their

language – also brought them within the purview of settler law. Opposition pressmen critiqued official assumptions that the island had been acquired by settlement rather than conquest, and appealed to international law to assert Indigenous rights to territorial sovereignty. Yet, no such challenge was put to Pedder on the bench.

In contrast to conventional whiggish narratives which underplay Pedder's judicial agency in these cases, this chapter demonstrates that precedents from the parent colony pointed to alternatives to prosecution. Pedder could have chosen to exercise judicial discretion, either to dismiss the cases or discharge the prisoners, or – as he did in the second trial – to appoint defence counsel and an interpreter. Pedder's judicial practice suggests that he did not recognise the ambiguous legal status of Indigenous people and their uncertain amenability to settler jurisdiction. Neither did he take steps to ensure that the linguistic, cultural and political barriers to a fair trial were adequately addressed.

Unlike his brother judges in New South Wales, Pedder did not entertain the possibility of legal pluralism on the island in the mid-1820s. Instead, he accepted the *de facto* existence of British sovereignty in Van Diemen's Land, and tried the four Indigenes as if they were ordinary British felons. In so doing, he effectively denied the existence of Indigenous sovereignty on the island – a course of action that cannot be reconciled with his construction as a champion of the Aboriginal people of Van Diemen's Land.

CHAPTER 9

EXTRA-CURIAL RESPONSES TO THE BLACK WAR: AN ALLY IN THE EXECUTIVE COUNCIL?

After the trial of Jack and Dick in 1826, no other Indigenous prisoners came before Chief Justice Pedder in the Supreme Court. Within weeks of their execution, a Government Notice dated 29 November 1826 framed Aboriginal aggression as felony or civil disturbance.¹ However, as frontier conflict intensified during 1827 and 1828, the colonial administration increasingly recognised that Indigenous people were engaged in 'warfare' with the settler-colonists.² Having been 'found by experience to be wholly insufficient for the general safety',³ the criminalisation of Indigenous resistance to colonisation was superseded, in practice, by a policy of 'separating the Aborigines from the white inhabitants, and ... removing the former entirely from the settled districts'.⁴ Between 1828 and 1830, the forcible expulsion of Indigenous people from zones occupied by the settler-colonists was authorised by a series of instruments which progressively placed Aboriginal people outside the normal operation of English law. An expulsion proclamation of 15 April 1828 was followed by the proclamation of martial law against all Indigenous people who remained within the 'settled districts' after 1 November 1828.

Since 1826, both the opposition and pro-government settler press had advocated Aboriginal expatriation as the solution to frontier violence.⁵ The

¹ Government Notices, 29 November 1826 and 29 November 1827, in A.G.L. Shaw (ed.), *Van Diemen's Land: Copies of all Correspondence between Lieutenant-Governor George Arthur and His Majesty's Secretary of State for the Colonies on the Subject of the Military Operations lately carried out against the Aboriginal Inhabitants of Van Diemen's Land* (London, House of Commons, 1831; facsimile edition, Hobart, Tasmanian Historical Research Association, 1971), (hereafter Shaw, *Military Operations*), pp. 20-21.

² George Arthur to Sir George Murray, 4 November 1828, in Shaw, *Military Operations*, p. 9.

³ Proclamation of martial law, 1 November 1828, in Shaw, *Military Operations*, p. 12.

⁴ Arthur to William Huskisson, 17 April 1828, in Shaw, *Military Operations*, p. 5.

⁵ L. Ryan, *The Aboriginal Tasmanians*, 2nd edn. (Sydney, Allen & Unwin, 1996), pp. 92, 94; J. Boyce, *Van Diemen's Land* (Melbourne, Black Inc., 2008), p. 354, n. 53. See, for example, *Hobart Town Gazette*, 11 November 1826, p. 2; *Colonial Times*, 1 December 1826, p. 2.

colonial administration resisted this option until 1831, when Governor Arthur conceded that he could find no alternative zone of 'asylum' on the main island of Van Diemen's Land.⁶ The strategy of 'spatial separation',⁷ formalised with the expulsion proclamation of 15 April 1828, culminated in the wholesale expatriation of Indigenous survivors to the islands of Bass Strait after February 1831.

With this shift in policy, the council room replaced the courthouse as the site of Chief Justice Pedder's official engagement with settler-indigenous conflict. As the only Executive Councillor to question the policy of expatriating all Indigenous inhabitants from the main island of Van Diemen's Land, Pedder has gained a reputation for championing the Aboriginal people. Recorded in the Executive Council minutes of 23 February 1831, his humanitarian concern that Indigenous exiles would 'soon begin to pine away when they found their situation one of hopeless imprisonment' has been read as a rare challenge to the genocidal impulses of settler colonialism by a senior government official.⁸ Indeed, since the late nineteenth century, historians and other commentators have regularly repeated James Bonwick's 1870 assessment that the chief justice 'protested vigorously' against 'an unchristian attempt to destroy the whole race'.⁹

In light of Pedder's decisive judicial role in criminalising Indigenous resistance during the 1820s, his apparent volte-face in 1831 requires explanation. This chapter examines the chief justice's changing conception of the Black War through a close reading of his extra-curial responses to two key policy decisions: the expulsion proclamation of 15 April 1828, and the

⁶ Ryan, *The Aboriginal Tasmanians*, p. 151.

⁷ cf. a similar policy of spatial separation was pursued in the 1820s in the Cape Colony, in an attempt to minimise conflict between European colonists and the indigenous Xhosa. See A. Lester, 'Cultural construction and spatial strategy on the Eastern Cape Frontier, 1806-c. 1840', *South African Geographical Journal* 78 (2) (1996), pp. 99-103.

⁸ Extract of the Minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

⁹ J. Bonwick, *The Last of the Tasmanians; or, The Black War of Van Diemen's Land* (London, Sampson Low, Son, & Marston, 1870), p. 240.

strategy of expatriation approved by the Executive Council on 23 February 1831.

In Pedder's legal opinion, Van Diemen's Land was a colony by settlement,¹⁰ in which English law and settler jurisdiction prevailed. The island's Indigenous people had formally been placed within the King's peace, and their armed resistance to colonisation constituted felony or civil disturbance. In section 9.1, a close reading of Pedder's response to the draft expulsion proclamation of April 1828 reveals that he continued to interpret the Black War in these legalistic terms, and approved the lawful use of lethal force against 'hostile' Indigenes. As his written advice to Governor Arthur highlights, however, Pedder also feared that the proclamation could unleash unauthorised and indiscriminate violence against 'harmless' Aboriginal people.

Bonwick's *The Last of the Tasmanians* (1870) is cited by a range of secondary sources which refer to Pedder's 1831 extra-curial objection to the policy of indiscriminate island exile. Indeed, Bonwick's denunciation of 'an unchristian attempt to destroy the whole race' is regularly attributed to Pedder himself.¹¹ Bonwick's retrospective reading of the chief justice's apparently 'prophetic' concern for the fate of the exiles is informed by the 'doomed race' paradigm which has permeated the island's historiography for more than a century. At section 9.2, a close reading of the Executive Council minutes of 23 February 1831 reveals that Pedder's actual remarks reflect a more complex set of legal, policy and humanitarian concerns, which do not share Bonwick's assumptions around the inevitable 'extinction' of the island's Indigenous people.

¹⁰ In colonies acquired by settlement, the land was 'assumed to be empty', so that 'most but not all of the laws of England were taken by settlers as their birthright'. B. Kercher, *An Unruly Child: A History of Law in Australia* (Sydney, Allen & Unwin, 1995), pp. xi-xii.

¹¹ Bonwick, *The Last of the Tasmanians*, p. 240. The assessment was repeated by Bonwick in *The Lost Tasmanian Race* (London, Sampson Low, Marston, Searle, and Rivington, 1884), p. 159.

9.1 Pedder's response to the expulsion proclamation: 'hostile' versus 'harmless' Indigenous

On 9 and 10 April 1828, Pedder and his fellow Executive Councillors met to consider the government's response to increasing Indigenous hostility.¹² A series of attacks during the previous year had prompted petitions from settler-colonists 'praying for protection from the outrages of these Savages'.¹³ Councillors were read a summary of reports from local police magistrates and the Office of the Brigade Major, which emphasised their perceived inability to respond to Indigenous aggression: the civil and military authorities were under-resourced; attacks were becoming more 'daring'; and constables and soldiers found it impossible to pursue Aboriginal aggressors across difficult terrain.¹⁴ In addition to these written reports, the Council heard the 'statements and opinions' of 'some Gentlemen supposed to be competent to afford information as to the causes of the late encreased [*sic*] hostilities'.¹⁵ The informants included two land commissioners, three settler capitalists, and a police magistrate.¹⁶ A single Indigenous person was also 'examined' by the Council, in the belief that the 'Black boy Tom' could facilitate planned negotiations with Indigenous leaders.¹⁷ The minutes do not record Tom's assessment. Instead, they emphasise the white stakeholders' argument that 'additional powers' were needed to ensure the 'safety and protection' of the colonists.¹⁸

Under common and statute law, settler-colonists already held considerable

¹² Minutes of proceedings of the Executive Council, 9 and 10 April 1828, Archives Office of Tasmania (hereafter AOT) EC4/1/1, ff. 293-303, reel Z1474.

¹³ Extract from a 'Memorial from settlers on the Macquarie and Elizabeth Rivers', cited in the Minutes of proceedings of the Executive Council, 9 April 1828, EC4/1/1, f. 296, reel Z1474.

¹⁴ Minutes of proceedings of the Executive Council, 9 and 10 April 1828, EC4/1/1, ff. 293-303, reel Z1474.

¹⁵ Minutes of proceedings of the Executive Council, 9 April 1828, EC4/1/1, f. 301, reel Z1474.

¹⁶ They were Land Commissioners, Roderic O'Connor and Peter Murdoch, and the 'Settlers' Mr Bryant, Lewis Gilles, and Thomas Marzetti. 'Mr Bryant' was probably one of the brothers, James and Edmund Bryant, who obtained land grants in the Midlands. The police magistrate was Pedder's old friend, James Simpson.

¹⁷ Minutes of proceedings of the Executive Council, 10 April 1828, EC4/1/1, f. 303, reel Z1474. An Indigenous leader, Black Tom (also known as Tom Birch or Kickerterpoller) was detained and subsequently released without charge several times for his attacks on settlers.

¹⁸ Minutes of proceedings of the Executive Council, 10 April 1828, EC4/1/1, f. 302, reel Z1474.

powers and responsibilities to assist the civil and military authorities to preserve the King's peace.¹⁹ In the absence of a professional police force, English authorities had conventionally relied on the general population, including members of the armed forces acting in their civilian capacity, to apprehend felons and quell civil disturbance.²⁰ The key mechanisms were the hue and cry, and the *posse comitatus*. In Blackstone's explanation, the hue and cry 'is the old common law process of pursuing, with horn and with voice, all felons and such who have dangerously wounded another'.²¹ It could be raised by a constable or any person who witnessed a crime, and bystanders were required to join in the pursuit. The *posse comitatus* refers to the 'population of able-bodied men above the age of fifteen in a county whom the sheriff may summon to repress a riot [or] pursue felons', as well as to the 'body of men so raised'.²² As Blackstone has it, the sheriff may command the '*posse comitatus*, or power of the county' for 'keeping the peace and pursuing felons'.²³

In *R. v. Magistrates of Hobart Town* [1825], Pedder had clearly articulated his judicial view that Van Diemen's Land was 'not acquired by conquest or treaty, but originally planted by Englishmen'.²⁴ The colony, he concluded, 'is strictly English' and 'Colonists bring with them, as their birthright, all the English laws so far as they are not affected by any particular Act of Parliament'.²⁵ Pedder's judicial rejection of legal pluralism on the island inflected his responses to the Black War: Van Diemen's Land was an English colony by settlement, and traditional common-law processes, like the hue and cry,

¹⁹ M. Hinton, 'And the Riot Act was read!', *Adelaide Law Review* 24 (1) (2003), p. 84; 13 Edw. I, cc. 1 and 4, *Statute of Winchester* (1285).

²⁰ Hinton, 'And the Riot Act was read!', pp. 83, 84, 86.

²¹ W. Blackstone, *Commentaries on the Laws of England* (Oxford, The Clarendon Press, 1765-1769), Book 4, Chapter 21, p. 290.

²² *OED*.

²³ Blackstone, *Commentaries*, Book 1, Chapter 9, p. 332.

²⁴ *R. v. Magistrates of Hobart Town* [1825], B. Kercher and S. Petrow (eds.), *Decisions of the Nineteenth Century Tasmanian Superior Courts* (Division of Law, Macquarie University and the School of History and Classics, University of Tasmania), <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1825/r_v_magistrates_of_hobart_town/> accessed 30 November 2011.

²⁵ *R. v. Magistrates of Hobart Town* [1825].

could legitimately be translated to the colonial frontier.

With a comparatively small settler population and British army garrison, Governor Arthur (combining the ranks of senior military and civil officer on the island) had only a small corps of convict police constables and insufficient military manpower at his disposal in the 1820s. The garrison comprised fewer than 1,000 officers and men, while there were only eighty-five constables and four 'military mounted police' in the expanded field police by 1827.²⁶ Arthur introduced paid police magistrates, usually military men, and divided the occupied zones of the island into magisterial districts, each with a military detachment.²⁷ Arthur's reorganisation of the police system in 1826 came in response to the escalation of frontier crime committed by convict absconders; when the bushranging crisis was suppressed, the police apparatus was redirected towards quelling Indigenous hostility. Nonetheless, limited local manpower and dispersed centres of white settlement meant that the colonial administration also relied on all able-bodied British subjects to assist in the maintenance of order. Indeed, in an early exemplary prosecution in the Supreme Court, a free settler was convicted for failing in this duty. As Chief Justice Pedder reminded the settler population in *R. v. Hogg* [1824], by law, 'every man was enjoined to aid and assist a peace officer, while in the execution of his duties'.²⁸

In addition to these existing common-law powers, Government Notices of 1826 and 1827 specifically articulated a series of 'justifiable measures' to which 'magistrates, constables and the military' might have 'recourse' in their efforts to apprehend or resist Aboriginal people suspected of committing

²⁶ J. Connor, 'British frontier warfare logistics and the "Black Line": Van Diemen's Land (Tasmania), 1830', *War in History* 9 (2) (2002), p. 149; S. Petrow, 'Policing in a penal colony: Governor Arthur's police system in Van Diemen's Land, 1826-1836', *Law and History Review* 18 (2) (2000), pp. 365-366; Arthur to Huskisson, 1 May 1828, *HRA* III, VII, p. 303.

²⁷ Ryan, *The Aboriginal Tasmanians*, pp. 90-91.

²⁸ *R. v. Hogg* [1824], *Decisions of the Nineteenth Century Tasmanian Superior Courts*, <http://www.law.mq.edu.au/research/colonial_case_law/tas/cases/case_index/1824/r_v_hogg/> accessed 1 December 2011. Original emphasis.

felonies.²⁹ Some measures, such as 'driv[ing] them by force to a safe distance, treating them as open enemies', responded to the exigencies of frontier collision and particular instructions from the Colonial Office.³⁰ Others reinforced the common-law requirement for officers of the peace to investigate offences and issue warrants to apprehend identified Indigenous aggressors, as if they were ordinary European criminals.³¹ It is against this background that the police magistrates sought 'additional powers' in 1828.

After a 'lengthened and anxious discussion' on 10 April 1828, the Executive Council 'unanimously' agreed that it had become 'absolutely necessary for the safety and protection of the lives and property of the White Inhabitants to expel the Natives from the Settled Districts entirely'.³² To effect this shift from criminalisation to spatial separation, Councillors advised the governor to issue a proclamation as a 'prompt and temporary' measure, until a more permanent legislative solution could be promulgated.³³ By a proclamation dated 15 April 1828, Arthur commanded all Aboriginal people to 'retire and depart' from the settled districts 'on pain of forcible expulsion ... and such consequences as may be necessarily attendant on it'.³⁴ Magistrates, persons deputised by them, and all British subjects 'whomsoever' in the colony, were directed to 'obey the directions of the civil, and to aid and assist the military power' to achieve this end.³⁵ Subject to certain provisos specified in the proclamation, the colonists were authorised to 'resort to whatever means a severe and inevitable necessity may dictate and require for carrying the same

²⁹ Government Notices, 29 November 1826 and 29 November 1827, in Shaw, *Military Operations*, pp. 20-21.

³⁰ Government Notice, 29 November 1826, in Shaw, *Military Operations*, p. 20; cf. Lord Bathurst's instructions to the colonial governors that 'when such disturbances cannot be prevented or allayed by less vigorous measures' it would be their duty to 'oppose force by force, and to repel such Aggressions in the same manner, as if they proceeded from subjects of an accredited State'. Bathurst to Darling, 14 July 1825, *HRA* I, XII, p. 21.

³¹ Government Notice, 29 November 1826, in Shaw, *Military Operations*, pp. 20-21.

³² Minutes of proceedings of the Executive Council, 10 April 1828, EC4/1/1, f. 302, reel Z1474.

³³ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 23.

³⁴ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 23.

³⁵ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 23.

into execution'.³⁶

Two days before the proclamation was issued, Chief Justice Pedder provided a detailed written response to a draft, which, he informed Arthur, he had 'considered ... attentively'.³⁷ Pedder's letter of 13 April 1828 reveals that he did not fundamentally oppose the measures authorised by the expulsion proclamation. Instead, his key concerns focussed on its potential to unleash unauthorised violence against all Indigenous people, because of its failure to differentiate between hostile and non-hostile Indigenes. In his written advice, the chief justice reminded Arthur that the Government Notices of 1826 and 1827 already provided for 'all cases in which natives have ... committed or are committing felonies or breaches of the Peace'.³⁸ Emphasising the construction of Aboriginal resistance as criminality, the Government Notices required a private individual who witnessed an Indigenous person committing an attack, robbery or murder to 'immediately raise his neighbours and pursue the felons'.³⁹ Pursuers who responded to this hue and cry were authorised to employ 'all such means as a constable might use'.⁴⁰ This included shooting an Indigenous person who resisted arrest or attempted to flee detention. As *R. v. Jamieson* [1827] had demonstrated in New South Wales, the use of lethal force to prevent the escape of a suspected Indigenous felon was regarded in law as justifiable homicide.⁴¹

The Government Notices of 1826 and 1827 also provided that, in cases 'short

³⁶ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 23.

³⁷ Pedder to Arthur, 13 April 1828, Papers of Sir George Arthur (hereafter Arthur Papers), vol. 9, ML ZA 2169, reel MAV/FM4/ 3671.

³⁸ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

³⁹ Government Notice, 29 November 1826, in Shaw, *Military Operations*, pp. 20-21.

⁴⁰ Government Notice, 29 November 1826, in Shaw, *Military Operations*, p. 21; 13 Edw. I, cc. 1 and 4, *Statute of Winchester* (1285).

⁴¹ *R. v. Jamieson* [1827] NSWSupC 31, B. Kercher (ed.), *Decisions of the Superior Courts of New South Wales, 1788-1899* (Division of Law Macquarie University), <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1827/r_v_jamieson/> accessed 30 November 2011.

of felony', Aboriginal people were to be 'treated as rioters'.⁴² Promulgated during a period of increased civil disturbance in England, the *Riot Act* (1715) provided a mechanism for breaking up violent breaches of the King's peace.⁴³ 'Riotous assemblies' of twelve or more people were instructed to disperse within an hour, or be dispersed by force. Any rioters apprehended during the dispersal were liable to prosecution for a felony without benefit of clergy; that is, a potential death sentence.⁴⁴ At the same time, private individuals were indemnified against killing or injuring rioters while trying to apprehend or disperse them.⁴⁵ In order for the forcible dispersal to be lawful, the *Riot Act* required an authorised person, such as a magistrate, to read the following warning 'openly and in a loud voice':

Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.⁴⁶

In Van Diemen's Land, the opposition *Colonial Times* observed sardonically that a settler confronted by a riotous assembly of Indigenous people would find it impossible to disperse them, as instructed by the Government Notice of 1826,

unless he has the extreme good fortune to have the "Statutes at Large" in his pocket, to enable him to turn to the Riot Act, in order to read it to a congregation of persons, who, speaking a totally different language, would of course be much edified and instructed by it.⁴⁷

The obvious cultural and linguistic barriers notwithstanding, Pedder's letter of 13 April 1828 reveals that, in his legal opinion, raising the hue and cry and

⁴² Government Notice, 29 November 1826, in Shaw, *Military Operations*, p. 20.

⁴³ 1 Geo. I. St. 2, c. 5, *An Act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters* (1715).

⁴⁴ Hinton, 'And the Riot Act was read!', p. 83.

⁴⁵ Hinton, 'And the Riot Act was read!', p. 86; 1 Geo. I., St. 2, c. 5, s. 3.

⁴⁶ 1 Geo. I., St. 2, c. 5, s. 2.

⁴⁷ *Colonial Times*, 15 December 1826, p. 2. The *Statutes at Large* were collections of Acts of Parliament published in multiple volumes, such as those edited by Ruffhead and Runnington (14 volumes), and Pickering (46 volumes).

reading the *Riot Act* constituted appropriate responses to Indigenous hostility towards settlers at the frontier.

In 1826, the *Colonial Times* had been critical that the Government Notice would have the effect of ‘impowering [*sic*] ... stock-keepers ... to hunt down and destroy their fellow men’.⁴⁸ Chief Justice Pedder approved of the lawful use of lethal force in cases of felony or civil disturbance, but he, too, was concerned that these powers should not be misused. Pedder shared the contemporary belief that convict stock-keepers at the remote frontiers of settlement were the primary aggressors against the Indigenous people. Again referring to the Government Notice of 1826, the *Colonial Times* feared that the ‘ignorant and uneducated’ stock-keepers would ‘construe that which they cannot comprehend according to their own inclinations, which universally tend to the destruction of the Natives’.⁴⁹ Writing to Arthur on 13 April 1828, Pedder expressed a similar anxiety that the expulsion proclamation could be misconstrued as giving the colonists a licence to attack any Indigenous person. To avoid uncertainty, he advised that the final proclamation should unambiguously direct colonists not to use ‘force in expelling the natives except under the orders of a military officer or a magistrate or of proper persons named by the magistrate as leaders of parties’.⁵⁰

In this instance, Pedder’s concerns influenced the final proclamation. As he told Arthur, ‘I cannot but observe that the minute of Council as it stands does not mention the reasons’ which he and his fellow Councillors had given for advising against a general authorisation of the use of force.⁵¹ The minutes of meeting for 10 April 1828 were subsequently amended to record, verbatim, Pedder’s reference to

our belief that it had been [the] common practice of the

⁴⁸ *Colonial Times*, 15 December 1826, p. 2.

⁴⁹ *Colonial Times*, 15 December 1826, p. 2.

⁵⁰ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

⁵¹ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

stockkeepers and others to attack or murder them, sometimes wantonly, sometimes in revenge, and our fear that, in the present state of feelings of the white inhabitants, those of them who are ill disposed would take advantage of the Proclamation, if so generally worded, to commit similar offenses [*sic*].⁵²

Pedder focussed particularly on one of 'the rules & restrictions', which appeared to him 'to be objectionable because it implies that the inhabitants may use force for the purpose of expelling the natives in the presence of any constable'.⁵³ This, he conceived, was 'not intended – unless [the constable] be appointed by the magistrate as the leader of a party'.⁵⁴ In response to Pedder's concern for more precise wording, the published proclamation explicitly stated that force was not to be used 'without the presence and direction of a magistrate, military officer, or other person of respectability, named and deputed to this service by a magistrate, of which class a numerous body will be appointed in each district'.⁵⁵

Pedder recognised that, at the remote frontiers of settlement, Indigenous hostility was provoked and inflamed by violent attacks by colonists. Having read the preamble of the draft proclamation, Pedder told Arthur

I must say it is not a true picture of the existing state of things according to my belief. A stranger reading it would imagine that the natives were the first to commit aggression and that the barbarities of the stock keepers were only acts of retaliation. The truth I believe to be exactly the reverse.⁵⁶

Despite acknowledging this unprovoked and unlawful settler violence, Pedder continued to interpret the colonial government's response to frontier conflict in comparatively narrow legalist terms. He did not question the use of lethal force, as long as it was legitimated by the 'presence and direction' of an authorised person. Similarly, in spite of his own judicial experience that

⁵² Minutes of proceedings of the Executive Council, 10 April 1828, EC4/1/1, f. 302, reel Z1474; Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

⁵³ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169. Original emphasis. This is Number 5 in the published proclamation. Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 7.

⁵⁴ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

⁵⁵ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 7.

⁵⁶ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

no settler had been prosecuted in the Supreme Court for offences against Indigenous people, the chief justice appears to have believed that safeguards contained in the proclamation could be effective on the ground. Reiterating gubernatorial directives going back to 1810, the proclamation affirmed that any 'unauthorized [*sic*] act of aggression or violence committed on the person or property of an Aboriginal' would be 'punished' as criminal offences, 'as if such violence had been offered, or murder committed on a civilized [*sic*] person'.⁵⁷ Settlers were specifically directed to use violent expulsion as a last resort only. The proclamation also 'invited and exhorted' Indigenous people to 'complain to' the authorities of any 'ill treatment',⁵⁸ in spite of the known practical obstacles to seeking redress.

Rule 5 of the published proclamation specified that 'Nothing herein contained shall authorize [*sic*], or be taken to authorize [*sic*], any settler or settlers, stock-keeper or stock-keepers, sealer or sealers, to make use of force, (except for necessary self-defence), against any Aboriginal, without the presence and direction' of an authorised person, such as a magistrate or military officer.⁵⁹ Pedder objected to the 'exception' of 'necessary self defence'.⁶⁰ Under common law, self defence was a recognised legal defence against murder in cases where violence or other provocation had been offered by the victim. In Pedder's reading, its inclusion in the proclamation therefore had the effect of implying 'a previous aggression by the natives, unnecessary and tending to a misapprehension of the object of the Proclamation'.⁶¹

Unlike the earlier Government Notices, the expulsion proclamation drew no distinction between hostile and non-hostile Indigenous people. As Pedder understood it, the 'object of this Proclamation is the expulsion wherever they

⁵⁷ Preamble, Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 6. Arthur refers here to David Collins' general order of 29 January 1810, and his own proclamation of 29 June 1824.

⁵⁸ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 7.

⁵⁹ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 7.

⁶⁰ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

⁶¹ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

may appear in the settled districts and however harmlessly they may be conducting themselves'.⁶² Thus, where previous instruments authorised the potentially lethal use of force against identified aggressors, the expulsion proclamation legitimised a blanket approach to all Indigenous people found within a geographically prescribed zone, whatever they were doing. The chief justice understood that 'The means [for expelling them] are to be shewing [*sic*] a force of soldiers and armed inhabitants, [and] if unhappily the shew [*sic*] of force should not be effectual then the force must act'.⁶³ In light of his belief in the 'wanton' violence of the stock-keepers, Pedder feared that, in circumstances where the absence of magistrate or officer would otherwise make the use of force unlawful, the exception of self defence could be used to evade criminal prosecution for attacks on 'harmless' Indigenous people, who had not offered any violence against attempts to expel them. This time, however, Pedder's advice was ignored, and the 'objectionable' phrase, 'excepting for necessary self defence', was retained in provision number 5 of the published proclamation.⁶⁴

Pedder's role in endorsing the expulsion proclamation has attracted insufficient critical attention from historians of Van Diemen's Land. Writing only seven years after the proclamation was issued, Henry Melville dismissed the 'Demarkation [*sic*] Proclamation' as 'absurd', 'extraordinary' and 'ridiculous'.⁶⁵ In the 1850s, John West outlined its key points, before concluding that its 'precise and legal language ... provoked much ridicule, and might justify a smile'.⁶⁶ Both Melville and West observe that the proclamation was drafted by the attorney-general, Thomas McClelland, and

⁶² Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169. Original emphasis.

⁶³ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

⁶⁴ Expulsion proclamation, 15 April 1828, in Shaw, *Military Operations*, p. 7.

⁶⁵ G. Mackaness (ed.), Henry Melville, *The History of Van Diemen's Land from the Year 1824 to 1835 Inclusive, During the Administration of Lieutenant-Governor George Arthur* (Sydney, Horwitz, 1965; originally published London, Smith and Elder, 1835), pp. 73, 75, 76, 77.

⁶⁶ A.G.L. Shaw (ed.), John West, *The History of Tasmania* (Sydney, Angus and Robertson, 1981; originally published Launceston, Henry Dowling, 1852), p. 278; Melville, *History of Van Diemen's Land*, p. 73. For a similar treatment, see also Bonwick, *The Lost Tasmanian Race*, pp. 78-81.

allude to the extraneous matter of this law officer's mental health.⁶⁷ Neither mentions the more salient fact that Chief Justice Pedder approved almost all of its provisions.

Twenty-first-century historiography largely continues the tradition of these standard nineteenth-century sources. Henry Reynolds identifies James Boyce, Graeme Calder and Ian McFarlane as belonging to a 'new generation of Tasmanian scholarship' on the Aboriginal histories of the island.⁶⁸ In recent monographs, all three assess the expulsion proclamation quite differently; their evident sympathy for the Indigenous people is reflected in a common focus on the devastating practical results of the proclamation. This is particularly evident in Calder's superficial summary, and results from his concentration on the *Mairremmener* (Oyster Bay and Big River) people, whose territory coincided with the 'settled districts'. Calder replicates, but fails to problematise, Melville's partisan criticism of its 'absurd' and 'farcical' provisions.⁶⁹

Boyce and McFarlane both engage specifically, albeit briefly, with Pedder's role in approving the proclamation. Writing about the Indigenous people of the North West of the island, who were not directly affected by the proclamation, McFarlane argues that Pedder's letter to Arthur reveals a 'more realistic assessment of the effect of the proclamation' and a keen awareness of its 'inherent dangers'.⁷⁰ Boyce's analysis of the expulsion proclamation forms part of an appendix to an environmental history of the convict society of Van Diemen's Land, and offers a more broadly

⁶⁷ West quotes Melville, with only slight variation, that McClelland's 'mental aberration led to his removal from office'. West, *The History of Tasmania*, p. 278; Melville, *History of Van Diemen's Land*, p. 73.

⁶⁸ H. Reynolds, 'Preface' in G. Calder, *Levéé, Line and Martial Law: A History of the Dispossession of the Mairremmener People of Van Diemen's Land, 1803-1832*. Studies in the History of Aboriginal Tasmania, vol. 2 (Hobart, Fullers Bookshop/University of Tasmania, 2010), p. vii.

⁶⁹ Calder, *Levéé, Line and Martial Law*, pp. 171-172.

⁷⁰ I. McFarlane, *Beyond Awakening. The Aboriginal Tribes of North West Tasmania: A History*. Studies in the History of Aboriginal Tasmania, vol. 1 (Hobart, Fullers Bookshop, 2008), p. 137.

contextualised discussion of the ‘policy of partition’ as an ‘innovative policy recommendation’ which ‘deserves greater attention’.⁷¹ Both readings, however, are influenced by an overly favourable conception of Pedder’s attitudes towards Indigenous people, based on the judge’s later advocacy of negotiation and treaty-making.⁷²

Relying on Bronwyn Desailly’s thirty-year-old Masters thesis, Boyce argues that, in recognising that the ‘object of this proclamation is their ... expulsion wherever they may appear in the settled districts and however harmlessly they may be conducting themselves’,⁷³ Pedder ‘confirmed that the legal pretence that had been maintained since 1803 – that the Aborigines were British subjects under the protection of the crown – had formally been abandoned’.⁷⁴ The effective legal status of Indigenous people in the early colonial period is a matter of continuing scholarly debate. Nonetheless, as the criminal prosecution of Indigenous aggressors during the mid-1820s had demonstrated, Pedder was confidently of the judicial view that Indigenous people in Van Diemen’s Land were subject to English law and settler jurisdiction. His advice to Arthur, that the Government Notices of 1826 and 1827 provided for cases in which Indigenous people committed felonies or breaches of the peace, clearly indicates that he regarded them as being within the King’s peace; that is, under the protection of the Crown.⁷⁵

An attentive reading of Pedder’s concern that the proclamation would apply to both hostile and harmless Indigenous people highlights his understanding

⁷¹ Boyce, *Van Diemen’s Land*, p. 262.

⁷² Boyce, *Van Diemen’s Land*, pp. 281-284, 291, 307; McFarlane, *Beyond Awakening*, pp. 149, 151, 164, 168, 189, 190.

⁷³ Boyce, *Van Diemen’s Land*, p. 265; citing B. Desailly, ‘The mechanics of genocide: Colonial policies and attitudes towards the Tasmanian Aborigines, 1824-1836’, unpublished Master of Arts thesis, History, University of Tasmania, 1977, p. 84.

⁷⁴ Boyce, *Van Diemen’s Land*, p. 265.

⁷⁵ Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169. Since the earliest colonisation of Van Diemen’s Land, governors had been instructed to ‘place the Native inhabitants ... in the King’s peace, and to afford their Persons and Property the Protection of British laws’. *HRA* III, I, p. 529. See also Connor, ‘British frontier warfare logistics and the “Black Line”’, p. 148, n. 22.

that it represented a break with common-law conventions, which required the identification, apprehension and prosecution of individual offenders for specified offences. Indeed, only seven months after the expulsion proclamation was issued, Pedder and the Executive Council approved the proclamation of martial law against Indigenous people within the settled districts on the basis that the 'powers of the common law' were 'wholly inadequate' to deal with Indigenous hostility.⁷⁶ The minutes of meeting record the Councillors' conviction that the 'great difficulty in apprehending [Indigenous aggressors], or identifying the perpetrators of a felony or murder, ... occasioned *impediments to the ordinary modes of enforcing the law*, which the magistrates and peace officers were unable to counteract'.⁷⁷ While Pedder and his fellow Councillors acknowledged that Aboriginal resisters were becoming more 'cunning',⁷⁸ it is significant that the specific difficulties articulated in their advice to Arthur do not concern the legal status of Indigenous, but relate entirely to settlers' inability to respond to frontier 'crime' in the usual way. The Councillors specified the impediments as

the nature of the country, the distance at which settlers reside from one another, the manner in which the natives made their attacks, and were enabled to retire and conceal themselves, the difficulty of knowing them, and of detecting them in their hiding places, [and] the impossibility of identifying the actual perpetrators of these enormities, either by knowledge of their persons, or by their being found in possession of any of the property of the victims of their attacks.⁷⁹

Far from confirming an abandonment of the 'legal pretence' of Indigenous people's status as British subjects, then, Pedder's response to the expulsion proclamation underscores his belief in its legal reality. The proclamation of

⁷⁶ Extract from the minutes of the Executive Council, 31 October 1828, in Shaw, *Military Operations*, p. 10.

⁷⁷ Extract from the minutes of the Executive Council, 30 October 1828, in Shaw, *Military Operations*, p. 10. Editorial emphasis. Only Chief Justice Pedder, Governor Arthur, and the Colonial Treasurer, Jocelyn Thomas, were present at this meeting, so it may be inferred that the legalism of the minutes reflects Pedder's concerns.

⁷⁸ Extract from the minutes of the Executive Council, 30 October 1828, in Shaw, *Military Operations*, p. 10.

⁷⁹ Extract from the minutes of the Executive Council, 31 October 1828, in Shaw, *Military Operations*, p. 10.

15 April 1828 was conceived as a 'temporary' solution to a particular threat, overwhelmingly characterised as felony or civil disturbance, which, settlers argued, could not be suppressed using their existing powers under common and statute law. In the tradition of the *Riot Act*, the expulsion proclamation represented a legislative response to a crisis, in which the legal processes usually applied to British subjects were suspended or augmented in defined circumstances and in the presence of formally authorised persons. Within the geographical zones in which settler jurisdiction was asserted by the expulsion proclamation, Pedder unquestionably regarded Indigenous people as British subjects answerable to settler law.

Boyce's focus on the deadly 'practical outcome' of the expulsion proclamation means that his reading does not sufficiently reflect the legalism of Pedder's understanding and overall endorsement of its provisions.⁸⁰ Boyce argues, for example, that 'previously illegal private vendettas' against Indigenous people were 'now sanctioned' by the proclamation, because its provisos were unenforceable.⁸¹ Pedder's advice to Arthur certainly reflects his fear that imprecise wording in the proclamation was likely to be misinterpreted by the 'ill disposed' as implicit approval for otherwise unlawful violence.⁸² In contrast, however, to Boyce – who disputes the brutal stock-keeper thesis⁸³ – Pedder primarily attributed 'wanton' violence against Aboriginal people to convicts at the frontier. Within his legalistic reading of the proclamation, Pedder sought to limit this violence through a stricter insistence on the presence of magistrates or military officers to authorise and direct the use of force. By ignoring the distinction which Pedder himself drew between his legal and humanitarian concerns, Boyce glosses the chief justice's specific objection to one of the provisions in the proclamation as an unsuccessful attempt to introduce 'changes ... with regard to the use of force'.⁸⁴ This

⁸⁰ Boyce, *Van Diemen's Land*, p. 264.

⁸¹ Boyce, *Van Diemen's Land*, p. 264.

⁸² Pedder to Arthur, 13 April 1828, Arthur Papers, vol. 9, ML ZA 2169.

⁸³ Boyce, *Van Diemen's Land*, pp. 205, 268.

⁸⁴ Boyce, *Van Diemen's Land*, p. 265.

reading implies that Pedder broadly opposed the use of force against Indigenous people; however, as his written advice of 13 April 1828 reveals, the chief justice endorsed the authorised use of lethal force, despite personally regretting its necessity.

9.2 Opposing exile: Pedder's dissenting voice

In the 1870s and 1880s, colonial historian, James Bonwick, published narratives of Indigenous-settler interaction, which he characterised as the 'death-bed story of the Tasmanians'.⁸⁵ Lamenting the 'extinction' of the Aboriginal people of Van Diemen's Land, *The Last of the Tasmanians; or, The Black War of Van Diemen's Land* (1870) and *The Lost Tasmanian Race* (1884) are infused with the 'doomed race' theory that informed settler-colonial discourses throughout the British imperial world during the nineteenth century.⁸⁶ As Lyndall Ryan argues, the myth of inevitable 'extinction' took hold in Van Diemen's Land after the Black War, as colonial writers sought to 'expiate' settler guilt for the violent dispossession of the island's Indigenous people.⁸⁷ Coinciding with the rise of social Darwinism, the deaths of the 'last male Aborigine', William Lanne, in 1869, and the 'last female', Truganini, in 1876,⁸⁸ ensured that inevitable 'extinction' became the dominant paradigm of the late-nineteenth-century colonial historians whose texts are still consulted

⁸⁵ Bonwick, *The Lost Tasmanian Race*, p. iii. Bonwick had worked in Hobart Town as a school teacher during the 1840s and visited the Aboriginal reserve at Oyster Cove in 1859, where he encountered dispossessed and demoralised Indigenous people in the aftermath of the Black War. G. Featherstone, Bonwick, James (1817–1906)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <<http://adb.anu.edu.au/biography/bonwick-james-3022/text4429>> accessed 15 December 2011.

⁸⁶ Bonwick, *The Lost Tasmanian Race*, p. iii; Ryan, *The Aboriginal Tasmanians*, pp. xxii–xxiii, 1–2; Calder, *Levée, Line and Martial Law*, p. 229; and cf. the 'vanishing Indian' in pan-imperial settler discourses. See, for example, C. Strobel, "'The history of the Cape is already written in that of America': The colonisation of America in South Africa's discourse of empire, 1820s–1850s", *Safundi: The Journal of South African and American Studies* 6 (4) (2005), p. 15.

⁸⁷ L. Ryan, 'How many? The doctrine of the self-exterminating savage and the debate about estimating the population of Aboriginal people in Tasmania in 1803', CAIA/Riawunna seminar, UTAS, 2009.

⁸⁸ Ryan, *The Aboriginal Tasmanians*, pp. 214, 219–220; S. Petrow, 'The last man: The mutilation of William Lanne in 1869 and its aftermath', *Aboriginal History* 21 (1997), pp. 90, 101, 109.

as standard sources.⁸⁹

A central component of Bonwick's 'extinction' narrative is the expatriation of Indigenous people from the main island of Van Diemen's Land to the islands of Bass Strait during the 1830s. Appointed in 1830 to 'conciliate the Natives', George Augustus Robinson travelled throughout Van Diemen's Land with Indigenous guides on the so-called 'Friendly Mission' between January 1830 and August 1834. By early 1831, this Evangelical London builder had persuaded a number of Indigenous people to place themselves under the government's protection and accompany him to Swan Island, at the eastern end of Bass Strait. This small island had been intended as a place of refuge from settler violence, but a lack of potable water and its proximity to the main island made it an unsuitable permanent settlement for the thirty-four Indigenous people then on the island. Asked to recommend an alternative, Governor Arthur's Aborigines' Committee proposed nearby Gun Carriage [Vansittart] Island; however, this, too, was found to be unsuitable.⁹⁰ Significantly larger, Flinders Island was ultimately chosen as the site for an 'Aboriginal Establishment'. More than 200 Indigenous people were transferred to the mission at Wybalenna between 1832 until 1847, when a small group of survivors was removed to Oyster Cove, near Hobart Town.⁹¹

Wybalenna has polarised historians and other commentators, who have represented it, alternatively, as a 'place of retreat for ... defeated warriors' and a 'concentration camp' with a notoriously high mortality rate.⁹² As Henry

⁸⁹ H. Reynolds, *Fate of a Free People* (Melbourne, Penguin Books, 1995), p. 202. The perspective is evident in the titles of contemporary histories of Indigenous Tasmanians. See, for example, Bonwick, *The Last of the Tasmanians* (1870) and *The Lost Tasmanian Race* (1884), and J. E. Calder, *Some Account of the Wars, Extirpation, Habits, &c., of the Native Tribes of Tasmania* (Hobart, Henn & Co., 1875).

⁹⁰ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 80.

⁹¹ Reynolds, *Fate of a Free People*, p. 159.

⁹² Ryan, *The Aboriginal Tasmanians*, p. 5; see, for example, R. Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787-1868* (London, Harvill, 1996), p. 423, and C. Turnbull, 'Tasmania: The ultimate solution' in F.S. Stephens (ed.), *Racism, The Australian Experience*, vol. 2 (Sydney, ANZ Publishing, 1972), p. 230, cited in Reynolds, *Fate of a Free People*, p. 159, and B. Madley, 'From terror to genocide: Britain's Tasmanian penal

Reynolds identified in the 1990s, Tasmanian historiography has traditionally responded with 'pity' or 'moral outrage' to the devastating outcome of island exile.⁹³ At once emphasising settler guilt and denying Indigenous agency, he argues, conventional histories offer 'sentimental and sad' narratives in which Aboriginal people are cast as the 'ultimate victims'.⁹⁴ Challenging this reading, Reynolds points to the petition from eight Indigenous spokesmen, identifying themselves as the 'free Aborigines ... of Van Diemen's Land now living on Flinders Island', which was presented to Queen Victoria in 1847.⁹⁵ As the petitioners explained to their 'mother', the queen, 'we are your free children ... we were not taken prisoners, but freely gave up our country to Colonel Arthur after defending ourselves'.⁹⁶ A growing body of Indigenous-centred research and the presence of vibrant Aboriginal communities in twenty-first-century Tasmania contest the assumption that Indigenous people 'died out'.⁹⁷ Nonetheless, the influence of the old 'extinction' paradigm continues to be felt in other historical genres.

Bonwick's 1870 rendering of Pedder's response to the policy of expatriation is still quoted uncritically, despite its social Darwinist assumptions around race,⁹⁸ and its failure to acknowledge the particular context of the Black War in February 1831. Bonwick was writing almost forty years after an Executive

colony and Australia's History Wars', *Journal of British Studies* 47 (1) (2008), p. 101. While 132 Indigenous people died during the five years at Wybalenna, Reynolds argues that such a high mortality rate was 'not atypical ... during the first generation of Aboriginal reserves and missions'. Reynolds, *Fate of a Free People*, p. 184.

⁹³ Reynolds, *Fate of a Free People*, pp. 189, 204.

⁹⁴ Reynolds, *Fate of a Free People*, p. 189.

⁹⁵ Reynolds, *Fate of a Free People*, pp. 7-9. While influential, Reynolds' reading of the petition is somewhat 'contentious'. Ryan, *The Aboriginal Tasmanians*, p. xxvii; K. Windschuttle, *The Fabrication of Aboriginal History. Volume One: Van Diemen's Land, 1803-1847* (Paddington, Macleay Press, 2002), pp. 232-237.

⁹⁶ Reynolds, *Fate of a Free People*, pp. 8-9, 25; N.J.B. Plomley, *Weep in Silence: A History of the Flinders Island Aboriginal Settlement, with the Flinders Island Journal of George Augustus Robinson, 1835-1839* (Hobart, Blubber Head Press, 1987), pp. 148-149.

⁹⁷ cf. the new series of Studies in the History of Aboriginal Tasmania, edited by Henry Reynolds and published by Fullers Bookshop/University of Tasmania. The first three volumes are based on recent PhD theses from the University of Tasmania.

⁹⁸ Anna Johnston and Mitchell Rolls characterise Bonwick's text as an exemplar of the 'racial science of high imperialism'. Johnston and Rolls, 'Reading *Friendly Mission* in the twenty-first century: An introduction' in A. Johnston and M. Rolls (eds.), *Reading Robinson: Companion Essays to Friendly Mission* (Hobart, Quintus Publishing, 2008), p. 17.

Council meeting in which, he asserted, 'Mr Chief Justice Pedder protested vigorously against the scheme of transportation' to the islands.⁹⁹ Putting words into Pedder's mouth, Bonwick reported that, 'He *declared* it an unchristian attempt to destroy the whole race, as once taken from their ancient haunts they would, he said, soon die'.¹⁰⁰ Emphasising the apparently inexorable fate of the Indigenous people, Bonwick completes his retrospective gloss with the claim that, 'Sir John Pedder, in after years, saw the fulfilment of his prophecy'.¹⁰¹

Bonwick's interpretation is cited by writers from a range of disciplinary perspectives, from judicial biography to international genocide scholarship. Transposing Bonwick's words, J.M. Bennett reiterates his assertion that Pedder 'made a vigorous protest' against the banishment to Flinders Island 'in 1835 [*sic*]'.¹⁰² In support of his reading of Pedder's 'moderate perceptions' of the Indigenous people, Bennett also repeats Bonwick's claim that the chief justice 'declared' the policy 'an unchristian attempt to destroy the whole race'.¹⁰³ Other writers cite Bonwick as evidence of genocidal intent in colonial Aboriginal policy. Examining the impact of isolated missions like Wybalenna on Indigenous stolen generations, interdisciplinary scholar, Anna Haebich, also quotes Bonwick; again, his words are attributed to Pedder.¹⁰⁴

Significantly, Bonwick was also the principal source for an unfinished chapter on the Indigenous people of Van Diemen's Land by Raphaël Lemkin, Polish Jewish jurist and originator of the post-Holocaust legal concept of genocide adopted by the United Nations in 1948.¹⁰⁵ As Reynolds has observed, most

⁹⁹ Bonwick, *The Last of the Tasmanians*, p. 240.

¹⁰⁰ Bonwick, *The Last of the Tasmanians*, p. 240. Editorial emphasis.

¹⁰¹ Bonwick, *The Last of the Tasmanians*, p. 240.

¹⁰² J.M. Bennett, *Lives of the Australian Chief Justices. Sir John Pedder: First Chief Justice of Tasmania, 1824-1854* (Sydney, The Federation Press, 2003), p. 68.

¹⁰³ Bennett, *Sir John Pedder*, p. 68; citing Bonwick, *The Lost Tasmanian Race*, p. 159.

¹⁰⁴ A. Haebich, *Broken Circles: Fragmenting Indigenous Families, 1800-2000* (Fremantle, Fremantle Arts Centre Press, 2000), p. 96.

¹⁰⁵ A. Curthoys, 'Disputing national histories: Some recent Australian debates', *Transforming Cultures eJournal* 1 (1) (2006), p. 11; United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

genocide scholars write about the Tasmanian experience with no real understanding of Indigenous guerrilla resistance.¹⁰⁶ Moreover, as Ann Curthoys points out, several genocide readings of the Black War were written before the posthumous publication of Lemkin's unfinished draft chapter on 'Tasmania' in 2005.¹⁰⁷ Curthoys's reassessment emphasises that Lemkin's treatment of the Van Diemen's Land experience represented one of approximately forty international case studies through which he was attempting to develop a methodology for identifying degrees of genocide or genocidal intent.¹⁰⁸ In contrast to Bonwick's opinion that exile represented an active 'attempt to destroy the whole race', Lemkin concluded that the colonial government had not acted with genocidal intent, but had 'failed in [its] basic duty of protection'.¹⁰⁹ Unfortunately, Lemkin's incomplete chapter on 'Tasmania' does not include an analysis, by a fellow jurist, of Pedder's 'protest' through the potentially useful lens of 'opposition to genocide by the genocidists'.¹¹⁰

In light of Bonwick's enduring influence, Reynolds' exhortation to explore the 'complexity' lacking in conventional narratives of the Black War must also be applied to analyses of Pedder's concerns about the policy of island expatriation.¹¹¹ A close reading of the Executive Council minutes draws attention to the fact that Pedder's own words cannot be interpreted as a straightforward 'protest' against an unmistakably genocidal policy. Instead, they reflect a range of humanitarian and policy concerns particular to the circumstances of February 1831.

It is not clear from Bonwick's account that Pedder raised doubts about the

¹⁰⁶ H. Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History* (Ringwood, Viking, 2001), p. 50.

¹⁰⁷ A. Curthoys, 'Raphaël Lemkin's "Tasmania": An introduction', *Patterns of Prejudice* 39 (2) (2005), pp. 163-164. See, for example, Windschuttle, *The Fabrication of Aboriginal History*, p. 14.

¹⁰⁸ Curthoys, 'Raphaël Lemkin's "Tasmania"', pp. 164-166.

¹⁰⁹ Curthoys, 'Disputing national histories', p. 13; and 'Raphaël Lemkin's "Tasmania"', p. 168.

¹¹⁰ Curthoys, 'Raphaël Lemkin's "Tasmania"', pp. 164-165.

¹¹¹ Reynolds, *Fate of a Free People*, p. 189.

policy of Indigenous expatriation in his capacity as an Executive Councillor. Consisting of a quorum of the chief justice, Governor Arthur, the Colonial Secretary, and Lieutenant-Colonel Logan of the 63rd Regiment, the Council met on 23 February 1831 to consider the recommendations of the Report of the Aborigines' Committee.¹¹² The Indigenous 'conciliator', George Augustus Robinson, was also 'examined at great length'.¹¹³ As Arthur later reported to the Colonial Office, the Council 'unanimously' accepted the recommendation of the Aborigines' Committee for the 'immediate formation of an establishment for the reception of the 34 Aborigines already under the protection of the government at Swan Island, and of any others who may desire to avail themselves of it'.¹¹⁴ The minutes of the meeting confirm that Pedder 'concurred with the other Members of the Council in advising the [voluntary] removal of the Natives from Swan Island to Gun-Carriage Island or any other of the adjacent islands which may be found adapted for their reception'.¹¹⁵ In a point overlooked by Bonwick, the chief justice further advised that Indigenous people who 'may hereafter be captured during any hostile incursion made by them' should also be removed to the island.¹¹⁶ The removal and detention of Indigenous prisoners would necessarily be involuntary; however, Pedder's recommendation carried the vital qualification that this should be a temporary exigency, 'until some satisfactory negotiation [*sic*] could be concluded with the tribes to which they belong'.¹¹⁷

Pedder's new faith in the possibility for further negotiation was inspired by

¹¹² Report of the Aborigines' Committee, 19 March 1830, in Shaw, *Military Operations*, pp. 35-46, 76-78.

¹¹³ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 80.

¹¹⁴ Arthur to Murray, 4 April 1831, and Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, pp. 78, 80.

¹¹⁵ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹¹⁶ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹¹⁷ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

the unexpected results of Robinson's 'Friendly Mission'. As Pedder explained to the Council, 'Until Mr Robinson had gone on his mission, scarcely any hope had been entertained of opening an amicable discourse' with the Aboriginal people.¹¹⁸ Indeed, Pedder and his fellow Executive Councillors had unanimously advised Arthur in August 1830 that, while they

still wish[ed] that conciliation may be attempted whenever practicable ... little can be hoped from attempts to negotiate with ... a people in so rude and savage a state as the Aboriginal Natives of this Island, who live in Tribes independent of each other, and who appear to be without Government of any kind, ... and ... are without any sense of the obligation of promises.¹¹⁹

In the aftermath of the Black Line operation of October-November 1830, Robinson's 'success', Pedder argued, 'justified a hope that more was attainable'.¹²⁰

As Arthur reported to the Colonial Office, the majority of Councillors supported the resumption of Robinson's 'mission ... with a view to conciliate others of the hostile Natives, and endeavour to induce them to go voluntarily to the establishment in the Straits, and there place themselves under the care and protection of the Government'.¹²¹ Here, the chief justice raised a dissenting voice. The minutes of meeting and Arthur's report to the Colonial Office record that Pedder did 'not coincide in opinion with the other Members, and does not recommend the adoption of measures tending to induce the Natives in tribes to consent to expatriation'.¹²² Where Arthur emphasises Pedder's alternative recommendation that 'we should still strive to negotiate [*sic*] with them',¹²³ the minutes record the chief justice's

¹¹⁸ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹¹⁹ Extract from the minutes of the Executive Council, 27 August 1830, in Shaw, *Military Operations*, p. 64. See also P. Chapman, 'Introduction. The march to Alexandria: Convict systems and the crisis with the Aborigines in 1830', *HRA* III, IX, pp. xlvii-xlviii, 615.

¹²⁰ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹²¹ Arthur to Murray, 4 April 1831, in Shaw, *Military Operations*, p. 78.

¹²² Arthur to Murray, 4 April 1831, in Shaw, *Military Operations*, p. 78; Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹²³ Arthur to Murray, 4 April 1831, in Shaw, *Military Operations*, p. 78.

insistence that he could not agree to the policy of wholesale 'expatriation and imprisonment, until the absolute necessity of such measures was clearly manifested'.¹²⁴ From Pedder's perspective, the unexpected success of Robinson's mission indicated that the potential for negotiation had not been exhausted in February 1831. As a result, the 'absolute necessity' of expatriation of whole 'tribes' could not yet be demonstrated.

Significantly, Pedder maintained this position despite Robinson's advice to the Council that, even if Indigenous leaders did agree to limit themselves to 'the unsettled parts of the island' and to 'prevent further aggressions on the part of their tribes', he did not think such 'promises would be attended to by the tribes'.¹²⁵ In Robinson's view, the chiefs did not have 'sufficient power ... to enforce obedience'.¹²⁶ For his part, Governor Arthur was similarly pessimistic that settler authorities could restrain hostile colonists. As the minutes of a subsequent Executive Council meeting record, Arthur conceded that, while the 'respectable class of settlers might be depended upon in maintaining the treaty, it would be hopeless to contemplate that it would be observed by their servants, runaway convicts, stock-keepers, and all that class of characters, who, being free by servitude, are under no special control'.¹²⁷ In recommending further negotiation, then, Pedder focussed on the legal mechanisms by which a peaceful settlement to conflict could potentially be achieved, rather than the political and practical obstacles to success.

As Reynolds points out, colonial policy acknowledged that international law imposed limits on the dispossession of indigenous peoples.¹²⁸ In *The Law of*

¹²⁴ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹²⁵ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, pp. 80-81.

¹²⁶ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, pp. 80-81.

¹²⁷ Extract of the minutes of the Executive Council, 14 March 1831, in Shaw, *Military Operations*, p. 83.

¹²⁸ Reynolds, *Fate of a Free People*, pp. 125-126, 128-129.

Nations (1760), Swiss jurist, Emmerich de Vattel, offered the 'classic apologia' for colonisation.¹²⁹ Yet, even as Vattel proposed that European colonisers could 'lawfully take possession of *a part of* a vast country', he reminded imperialists that they could not dispossess indigenous peoples entirely from their lands.¹³⁰ Colonists and Indigenes alike were to be confined within certain 'bounds'.¹³¹ Conscious of the government's obligations under international law, and of practice in other British settler colonies, Pedder informed the Executive Council that he 'wished it to be ascertained whether some treaty could not be made with these people, by which their chiefs should engage for their tribes not to pass certain lines of demarkation [*sic*], which might be agreed upon'.¹³² Unlike the expulsion proclamation of April 1828 and the proclamation of martial law in November 1828 – where lines of demarcation were determined by the colonial administration and imposed upon the Indigenous people – Pedder now seemed to be proposing that future boundaries could be determined by negotiation between the colonial government and Indigenous leaders. Moreover, the chief justice now recognised the capacity of Indigenous leaders to negotiate on behalf of their peoples. Pedder's comments also indicate a new acceptance that legal pluralism was possible; that is, settler and Indigenous territorial jurisdiction could exist in separate zones of the island, albeit with settler jurisdiction prevailing in land occupied or coveted by colonists.

Pedder also argued for the deployment of government agents, who would live among the Indigenous people to perform the dual role of protecting and 'civilising' the 'tribes'. As he explained to the Council in 1831, 'Up to the present moment, when aggressions have been made upon the Natives, they have not known to whom to complain, nor, had they known, could their

¹²⁹ Reynolds, *Fate of a Free People*, p. 125.

¹³⁰ E. de Vattel, *The Law of Nations* (London, 1760), p. 91, cited in Reynolds, *Fate of a Free People*, pp. 125-126. Editorial emphasis.

¹³¹ Reynolds, *Fate of a Free People*, pp. 125-126.

¹³² Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

evidence have been used to bring the offender to justice'.¹³³ If Indigenous leaders accepted a proposal to 'allow an [*sic*] European agent to reside with or accompany each tribe', Pedder's legal mind reasoned, these individuals would be competent to give evidence on their behalf.¹³⁴ As with his preference for further negotiation, Pedder's proposed use of European agents indicates that he was familiar with a repertoire of strategies from around the British settler-colonial world,¹³⁵ which, he argued, should also be deployed in Van Diemen's Land. Only after these strategies had been attempted without success would he agree to wholesale expatriation as the option of last resort.

For Bonwick, as for the sympathetic twenty-first-century reader, Pedder's apparent foreboding that Indigenous people 'soon die' when 'taken from their ancient haunts' is of particular humanitarian interest. Writing about the 'Tasmanian catastrophe', frontier genocide scholar, Benjamin Madley, argues that the colonial authorities should have known that the Flinders Island 'offshore detention centre' would be fatal: 'Even before it was established', he asserts, 'officials warned that Wybalenna would be unhospitable, if not deadly'.¹³⁶ The official Madley refers to is Chief Justice Pedder. While Madley quotes the Executive Council minutes rather than Bonwick, his reading that Pedder 'warned' the Executive Council that 'Aborigines held on any Bass Strait island "would pine away when their found their situation one of hopeless imprisonment"' similarly obscures the focus of Pedder's concern.¹³⁷

In Madley's model of international settler genocide, the 'final phase of the frontier genocide pattern' centres on the incarceration of indigenous people in an 'ethnic gulag' under conditions that are 'likely or even intended to

¹³³ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹³⁴ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹³⁵ cf. the similarity with strategies employed in British North America. Haebich, *Broken Circles*, p. 96. The influence of Pedder's old friend, Saxe Bannister, who had acted for Mohawk leaders in the early 1820s, and continued to advocate for indigenous peoples, is an area for potentially fruitful future research.

¹³⁶ Madley, 'From terror to genocide', p. 101.

¹³⁷ Madley, 'From terror to genocide', p. 101, citing Chapman, 'Introduction', *HRA* III, XI, p. liv.

destroy significant numbers through malnutrition, insufficient provision of clothing, exposure to the elements, inadequate medical care, and unsanitary conditions'.¹³⁸ These extrinsic factors were soon identified by officials on Flinders Island as contributing to the high Indigenous mortality rate at Wybalenna. However, they were not the factors identified by Pedder in 1831 as likely to cause Indigenous deaths. An attentive reading of the Executive Council minutes highlights Pedder's apprehension that expatriated Indigenes would die 'however carefully' they 'might be supplied with food'.¹³⁹ In Pedder's view, it was not the adverse conditions of the island or inadequate provisions per se, but the restraints imposed upon Indigenous people as a result of disconnection from their own country and traditional ways of life.

Pedder specifically rejected Robinson's opinion that the Indigenes would not 'regret their inability to hunt and roam about in the manner they had previously done on [the main] island'.¹⁴⁰ In the culturally inflected language of the time, the chief justice expressed his anxiety that the 'bounds' of an island reserve would be 'so narrow as necessarily to deprive them of those habits and customs which are the charms of their savage life'.¹⁴¹ Where Robinson was 'confident' that the Indigenous exiles would 'be enabled to fish, dance, sing, and throw spears, and amuse themselves in their usual way',¹⁴² Pedder recognised that a sedentary settlement on a small island was incompatible with 'that unbounded liberty of which they have hitherto been in the enjoyment'.¹⁴³ The lack of geographical restraint was an essential component of the Aboriginal people's nomadic lifestyle and culture, as

¹³⁸ B. Madley, 'Patterns of frontier genocide, 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia', *Journal of Genocide Research* 6 (2) (2004), pp. 174, 175.

¹³⁹ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82

¹⁴⁰ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 81.

¹⁴¹ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹⁴² Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 81.

¹⁴³ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

Pedder identified with his further acknowledgement of 'their known love of change of place, their periodical distant migrations, [and] their expeditions in search of game'.¹⁴⁴

As an expatriate, separated from his own native land for an extended period, Pedder was perhaps sensitive to the pernicious effects of home sickness. Moreover, he belonged to a generation which recognised 'nostalgia' as a potentially fatal medical condition. Since the late seventeenth-century, European physicians had documented cases of fatal home sickness or *mal du pays*, especially among the Swiss mercenaries first observed to suffer from it while stationed in the French lowlands.¹⁴⁵ During the later nineteenth century, medical opinion increasingly categorised home sickness as a psychological, rather than a physical, illness.¹⁴⁶ Fatal homesickness was also invoked in Van Diemen's Land to account for the 'extinction' of the Indigenous people.

In *The Last of the Tasmanians*, Bonwick draws an explicit parallel between the Aboriginal people and the Swiss: 'The *Ranz des Vaches* [Swiss herdman's song believed to provoke nostalgia] appeals to the imagination, and excites romantic impulses, though proceeding from the lips of voluntary exiles from their Swiss mountain-home. Can it be less affecting to witness the tear-dimmed glance of the Tasmanian at the hills from which he was stolen ... ?'¹⁴⁷ In a passage that resonates with eighteenth-century accounts of European soldiers who pined for their homelands, Bonwick cites the opinion of a medical attendant on Flinders Island, who believed that the Indigenous exiles 'pine away, not from any positive disease, but from a

¹⁴⁴ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

¹⁴⁵ S. Bunke, 'Heimweh' in B. von Jagow and F. Steger (eds.), *Literatur und Medizin im europäischen Kontext: Ein Lexikon* (Göttingen, Vandenhoeck & Ruprecht, 2005), pp. 333-334; L. Hutcheon, 'Irony, nostalgia, and the postmodern' (1997), University of Toronto English Library Criticism and Theory Resources, [n.p.]

<<http://www.library.utoronto.ca/utel/criticism/hutchinp.html>> accessed 15 December 2011.

¹⁴⁶ Bunke, 'Heimweh', p. 335; Hutcheon, 'Irony, nostalgia, and the postmodern', [n.p.].

¹⁴⁷ Bonwick, *The Last of the Tasmanians*, p. 390.

disease they call “home sickness””.¹⁴⁸ As Dr Barnes explained, ‘They die from a disease of the stomach, which comes on entirely from a desire to return to their own country’.¹⁴⁹

In contrast, then, to Bonwick’s belief in a ‘doomed race’ and his post-hoc evocation of the ‘romantic’ trope of fatal homesickness,¹⁵⁰ Pedder’s apprehension that Indigenous people would ‘pine away’ was not a prophecy of inevitable ‘extinction’. Instead, it recognised that, even with their ‘consent’, the expatriation of whole Indigenous communities from the main island of Van Diemen’s Land would sever their connection to their traditional lands and irrevocably interfere with their capacity to practise their ancient ‘habits and customs’.¹⁵¹

Conclusions

As the Black War escalated in the late-1820s, the colonial administration shifted the focus of its policy response from criminalisation to spatial separation. No Indigenous prisoners came before Pedder in the Supreme Court after 1826; however, the chief justice’s extra-curial advice to Governor Arthur reveals that he continued to read Aboriginal resistance as felony or civil disturbance. Pedder’s written advice to Arthur on the expulsion proclamation of April 1828 illustrates that he maintained his judicial view that Van Diemen’s Land was a colony by settlement, in which settler law prevailed. The chief justice was careful, however, to distinguish between ‘hostile’ and ‘harmless’ Indigenes, and he formally objected to measures that were designed to apply indiscriminately to all Aboriginal people. Pedder approved the forcible removal of hostile Indigenous people from the settled districts, so long as the use of force was directed by persons authorised by the provisions of the proclamation of 15 April 1828.

¹⁴⁸ Bonwick, *The Last of the Tasmanians*, p. 390.

¹⁴⁹ Bonwick, *The Last of the Tasmanians*, p. 390.

¹⁵⁰ Bonwick, *The Last of the Tasmanians*, p. 390.

¹⁵¹ Extract of the minutes of the Executive Council, 23 February 1831, in Shaw, *Military Operations*, p. 82.

Pedder feared, however, that the 'additional powers' sanctioned by the expulsion proclamation could be abused by the 'ill disposed'. A close reading of Pedder's response to the draft proclamation reveals that he was alert to the dangers of a policy instrument that could be (wilfully) misinterpreted by unpoliced colonists at the remote frontier. Nonetheless, he maintained his faith in the capacity of the law to furnish a remedy: greater precision in the provisions of the proclamation to cover all contingencies; and an exhortation to Indigenous people to complain to the authorities of ill-treatment. In light of his own judicial experience that no settler had been prosecuted in the Supreme Court for offences against the Aboriginal people, and of the barriers to Indigenous testimony, Pedder's confidence in these legal mechanisms appears misplaced.

Steeped in the law and bound by his official duty to the colonial government, the chief justice nonetheless evinced humanitarian concern for the Indigenous inhabitants. Pedder's capacity to separate his professional advice from his private sympathy has been lost in later readings of his attempt to moderate the policy of expatriation. Central to his construction as a champion of the Aboriginal people of Van Diemen's Land, James Bonwick's retrospective gloss on Pedder's 'protest' against 'an unchristian attempt to destroy the whole race' has been cited by scholars from a range of disciplines, either to demonstrate the judge's sympathetic attitude towards the Indigenous people, or as evidence of a vain attempt to warn of inevitable 'extinction'. An attentive reading of Pedder's own words, recorded in the Executive Council minutes and in Arthur's report to the Colonial Office, reveals a more complex set of legal, policy and humanitarian concerns. In February 1831, the chief justice agreed with the removal of Aboriginal people, who had already placed themselves under the government's protection, from Swan Island to a more suitable island refuge. He also approved of the involuntary removal of hostile captives to the island establishment, albeit as a temporary exigency.

The point of difference between Pedder and the majority of the Executive Council highlights a significant shift in the chief justice's understanding of the relationship between Indigenous and settler-colonists. In contrast to his earlier confidence in settler jurisdiction and the status of Aboriginal people as British subjects answerable to settler law, Pedder now recognised the potential for legal pluralism on the island. Where he had previously regarded Indigenous aggressors as felons or subjects in rebellion against the authority of the Crown, Pedder now acknowledged the obligation of the colonial government to negotiate with Indigenous leaders to find a peaceful settlement to the Black War. While Pedder's endeavours to achieve a 'treaty' or 'amicable agreement' that would have allowed Aboriginal people to remain on the main island were ultimately unsuccessful, they indicate an important change in Pedder's reading of the Black War, which deserves further investigation.

Just as the remarks recorded in the Executive Council minutes are more complex than Bonwick's rendering, so an evaluation of Pedder's reputation as a champion of the Aboriginal people requires a more nuanced and historically sensitive reading of the primary sources and the ideological context in which they were generated. Within the parameters of his professional duty as chief justice and Executive Councillor, Pedder reminded the colonial government of its obligation to deal lawfully with the Indigenous population. For the greater part of the Black War, Pedder's judicial view that Aboriginal people were British subjects under settler jurisdiction underpinned his assumptions around the criminalisation of resistance. With his belated realisation that it would be possible to negotiate with Indigenous leaders, Pedder also recognised the potential for settler and Indigenous territorial jurisdictions to co-exist on the island. His dissenting voice in the Executive Council meeting of 23 February 1831 was, therefore, less a prophecy of 'extinction', than a judicially informed appeal to exhaust the newly recognised possibilities for a negotiated settlement, before indiscriminate expatriation was adopted as the option of last resort.

CONCLUSION

This thesis takes up Philip Girard's challenge to engage critically with the enterprise of judicial biography. In the British settler colonies, he argues, 'the "window on an age" approach ... comes into its own, as judges play many different roles in colonial societies and their lives ... throw light on aspects of colonial history that would otherwise remain obscure'.¹ By approaching John Lewes Pedder as a 'window' on his age, this study addresses a conspicuous historiographical lacuna around his life and official career. In the absence of sustained and historically sensitive analyses of the chief justice's thirty years in colonial office, it identifies a series of simplistic popular and scholarly constructions that have emerged to fill the gap. Heeding Paul Halliday's caution against writing about 'past ideas and practices as if their purpose was to make our own',² this thesis embraces the 'comparativist propensity' of a growing body of colonial legal historiography, and seeks to understand Pedder's tenure in Van Diemen's Land on its own terms.³

Alert to the divergent interests and interpretative strategies of lawyers and historians, this thesis experiments with an interdisciplinary 'conversation',⁴ which argues for an increased integration of disciplinary paradigms. This is very much a historian's thesis, however, and does not share the presentist professional concerns of many lawyer-historians. Instead, it engages in a 'continuing dialogue with the broad themes of national, colonial and imperial history', which, as Girard argues, has the 'potential to make a major contribution to the socio-legal history of the common law world'.⁵ To reiterate Girard's logic, this study conceptualises Pedder as a 'starting point'

¹ P. Girard, 'Judging lives: Judicial biography from Hale to Holmes', *Australian Journal of Legal History* 7 (1) (2003), p. 102.

² P.D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass., Belknap Press of Harvard University Press, 2010), p. 2.

³ P. Karsten, 'The CANZ approach to legal history', *Law and History Review* 21 (3) (2003), p. 617.

⁴ D. Kirkby, 'Law[yer]'s history, conversationally speaking', *Australian Journal of Legal History* 7 (1) 2003, pp. 47-52.

⁵ Girard, 'Judging lives', p. 106.

from which to 'look out ... at the surrounding society'⁶ – not *forward* to the present day. This approach inevitably highlights some of the limitations, increasingly identified by transnational historians, of using the modern nation-state as a frame through which to read the colonial era.⁷ Its corollary is an expansive and historically sensitive reading of a more broadly conceived archive.

Findings and implications

This thesis demonstrates that Chief Justice Pedder's pivotal role in the government of Van Diemen's Land makes him an ideal vehicle through which to explore key political contests from a new perspective. As Girard points out, the contributions of colonial judges are 'likely to be ... as much in the political and social spheres as in the purely legal'.⁸ Framing Pedder's experience within comparative colonial legal historiography, this study stresses that his *ex officio* membership of the executive and legislative branches of government was not 'extraordinary',⁹ but common practice in the settler colonies in the early nineteenth century. In contrast to John McLaren's 'maverick' judges, Pedder's Tory sensibilities and monarchical view of government meant that he more readily adhered to a 'Baconian' conception of judicial duty as loyal service to the Crown, and retained Colonial Office support during a thirty-year appointment 'at pleasure'.¹⁰

Critically engaging with Philip Hamburger's insights into old common-law ideals of 'judicial duty', the chapters of Part II emphasise that Pedder's sense of his 'internal' independence provides a valuable lens through which to reassess whiggish critiques of the formal absence of separation of powers.¹¹

⁶ Girard, 'Judging lives', pp. 89-90. Editorial emphasis.

⁷ A. Curthoys, 'Cultural history and the nation' in H-M. Teo and R. White (eds.), *Cultural History in Australia* (Sydney, UNSW Press, 2003), p. 22.

⁸ Girard, 'Judging lives', p. 90.

⁹ *Colonial Times*, 26 May 1826, p. 2.

¹⁰ J. McLaren, 'Men of principle or judicial ratbags? The trials and tribulations of maverick colonial judges in the nineteenth century or a funny way to run an empire', *Windsor Review of Law and Social Issues* 27 (2009), p. 147.

¹¹ P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass./London, Harvard University Press,

Similarly, a better appreciation of Pedder's judicial obligation to judge matters 'in accord with the law of the land' provides an alternative reading of key constitutional contests in the colonies.¹² Where conventional treatments compare Pedder's legalistic determinations on the touchstone issues of trial by jury and freedom of the press unfavourably with the liberal and rhetorical reasoning of his contemporary Francis Forbes, this thesis engages with new scholarship to identify Pedder's logical legal reasoning and adherence to a Blackstonian emphasis on the 'condition' of the colony.¹³

Addressing a significant aspect of Pedder's official career which has been glossed in existing accounts, this thesis makes an original contribution to the historiography of settler-indigenous interaction on the island. Here, an interdisciplinary perspective is of particular value. Part III demonstrates that Pedder's inherently legalistic reading of the early phases of frontier conflict was underpinned by his judicial conviction that Van Diemen's Land was a settled colony, in which Aboriginal people were nominally British subjects and settler law prevailed. Situating itself within a growing body of international scholarship which proposes that the assertion of settler sovereignty in the Anglophone colonial world was a faltering and inconsistent process before 1836, this study demonstrates that Pedder's decision to allow the criminal prosecution of four Indigenes for their involvement in frontier killings in the mid-1820s predated similar prosecutions in New South Wales. Unlike some of his judicial counterparts, Pedder appears to have disregarded contemporary concerns around the ambiguous legal status of Indigenous people and their uncertain amenability to settler jurisdiction, and taken the 'innovative' step of trying the four Indigenes as if they were ordinary British felons.¹⁴ Reading colonial case law

2008), p. 16.

¹² Hamburger, *Law and Judicial Duty*, p. 17.

¹³ I. Holloway, S. Bronitt, and J. Williams, 'Rhetoric, reason and the rule of law in early colonial New South Wales' in H. Foster, B.L. Berger, and A.R. Buck (eds.), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver, UBC Press, 2008), pp. 91-92, 94, 98.

¹⁴ L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia*,

through the lens of the common-law thinking which generated the criminal charges provides new insights into Pedder's role in these Indigenous prosecutions. By elucidating the doctrines and assumptions behind his black-letter reading of the law, this study demonstrates that an interdisciplinary perspective assists non-legal historians to interpret the forensic evidence as it was understood by the court, and thereby discern the mechanics of criminalising Indigenous resistance.

By taking a transnational perspective, this thesis highlights the presence of many non-Indigenous blacks on the island during the early nineteenth century, and draws attention to the false 'binary' of black indigenes and white colonisers that continues to dominate Australian historiography.¹⁵ Positively identifying the 'black man' shot by William Tibbs in 1824 as an American man of colour, Chapter 7 successfully contests the claim that Pedder's first criminal trial in the Supreme Court constitutes a 'seminal example' of the impartial administration of justice in cases relating to settler-indigenous conflict.¹⁶

Historiographical misconceptions around Pedder's extra-curial responses to frontier collision similarly highlight the value of an interdisciplinary reading of his judicial legitimisation of colonisation. As the colonial administration's policy response to the Black War shifted from criminalisation to spatial separation, so Pedder's early legalistic reading of Indigenous resistance as felony or civil disturbance was partially superseded by a new recognition of the potential for legal pluralism and negotiation. While some scholars contest the status of Van Diemen's Land under international law, Chapter 9 underscores Pedder's judicial conviction that it was a settled colony, and elucidates some of the implications of this opinion for his subsequent policy

1788-1836 (Cambridge, Mass., Harvard University Press, 2010), p. 2.

¹⁵ C. Pybus, *Black Founders: The Unknown Story of Australia's First Black Settlers* (Sydney, University of New South Wales Press, 2006), pp. 180-181.

¹⁶ G. Green, 'The marginalisation of law in Australia', Order of Australia Oration, 2006, p. 9, <<http://www.theorderofaustralia.asn.au/downloads/OAA2006ORATIONSirGuyGreen.pdf>> accessed 5 November 2009.

advice. Mirroring the law's concern to distinguish the guilty from the innocent, Pedder consistently differentiated between 'hostile' and 'harmless' Indigenes and formally objected to measures that were designed to apply indiscriminately to all Aboriginal people.

Pedder's benevolent construction as a champion of the Aboriginal people of Van Diemen's Land hangs on his extra-curial reluctance to support a policy of wholesale Indigenous expatriation at the end of the Black War. Echoing Henry Reynold's critique of a Tasmanian historiographical tradition that has 'no room for complexity',¹⁷ this thesis demonstrates that Pedder's legalistic reading of the Black War has been largely ignored in favour of his more congenial humanitarian concern that Indigenous exiles would 'soon begin to pine away when they found their situation one of hopeless imprisonment'.¹⁸ Comparison of Pedder's actual remarks with James Bonwick's 1870 gloss illustrates that the judge articulated a more complex set of legal, humanitarian and policy concerns than the oversimplified protest against 'an unchristian attempt to destroy the whole race' reported by Bonwick.¹⁹

Scholarly focus on Pedder's (unsuccessful) support for a 'treaty' or 'amicable agreement' that could have allowed Aboriginal people to remain on the main island similarly distracts attention from his overarching confidence in the legitimacy of settler jurisdiction. In emphasising a potential 'treaty', scholars gloss over the significance of Pedder's willingness to sanction a limited island exile, and do not sufficiently interrogate the implications of his judicially informed appeal to exhaust the newly recognised possibilities for a negotiated settlement as an obligation under international law.

¹⁷ H. Reynolds, *Fate of a Free People* (Melbourne, Penguin Books, 1995), p. 189.

¹⁸ Extract of the Minutes of the Executive Council, 23 February 1831, in A.G.L. Shaw (ed.), *Van Diemen's Land: Copies of all Correspondence between Lieutenant-Governor George Arthur and His Majesty's Secretary of State for the Colonies on the Subject of the Military Operations lately carried out against the Aboriginal Inhabitants of Van Diemen's Land*. Facsimile edition (Hobart, Tasmanian Historical Research Association, 1971; originally published London, House of Commons, 1831), p. 82.

¹⁹ J. Bonwick, *The Last of the Tasmanians; or, The Black War of Van Diemen's Land* (London, Sampson, Low, Son & Marston, 1870), p. 240.

By following the ‘archival byways’ away from the sites of Pedder’s official life,²⁰ this thesis disproves the myth that the chief justice was a solitary ascetic, who lived only through his work. Part I illuminates the broad range of social interactions of this elite colonial figure whose unusually stable status provided a ‘benchmark’ for gentility and respectability in a fluid settler-colonial society. The tools and interpretative strategies of social and family history shed light on personal relationships and family dynamics: Pedder is newly revealed as an affectionate husband, brother, and uncle/foster-father, and a man who was deeply conscious of the obligations of friendship. He was a benevolent, if paternalistic, employer, and his engagement in a range of charitable and philanthropic endeavours highlights his concerns for child and animal welfare, adult education and community healthcare. Respected by his peers as an ‘accomplished scholar’,²¹ Pedder’s enthusiasm for science and cultural pursuits linked him to local and international communities of interest, while a passion for gardening, shared with his wife Maria, offered a vital refuge from the pressures of public life.

Privileging a biographical perspective on an age of patronage, this thesis traces the connections which linked Pedder to powerful, intersecting networks, and demonstrates how the influence of intermediaries facilitated his appointment to judicial office in Van Diemen’s Land. Complementing the quantitative perspective of the prosopographical studies of Duman, Earls and Neale, an attentive reading of Pedder’s particular experience highlights the importance of non-professional factors in an era of recruitment by personal recommendation. Moreover, it demonstrates that – far from being ‘eccentric’ – Pedder’s appointment to the colonial judiciary was broadly consistent with contemporary Colonial Office practice.

Looking *out* rather than *forward*, a comparative and transnational

²⁰ N. Salvatore, ‘Biography and social history: An intimate relationship’, *Labour History* 87 (2004), p. 190.

²¹ *Colonial Times*, 13 July 1855, p. 3.

perspective establishes the context for a clearer understanding of the world in which Pedder operated. Tracing his early personal and professional life in the metropolis demonstrates how the specificities of individual experience can illuminate broader processes. Pedder's education at public school, Cambridge and the Inns of Court is redolent of a common trajectory for eldest sons of urban commercial families whose aspirations for social mobility depended on the internalisation of elite values and the acquisition of gentlemanly rank through professional status. Similarly, recognition of the impact of professional competition and post-war economic dislocation on the 'pseudo gentry' to which Pedder belonged points to some of the push factors that persuaded several generations of expatriate colonial careerists to seek employment outside England.²²

Avenues for future research

This thesis is predominantly qualitative; however, it also recognises, and benefits from, the insights of a variety of quantitative projects. The prosopographical studies of Duman, Earls and Neale indicate that analysis of a meaningful and measurable set of variables can flesh out vital context for making sense of the lives and careers of colonial officials during the long nineteenth century. Complementing their approach, the thick description and micro-historical analysis of this study adds new data and layers of detail to our knowledge about an individual judge, and potentially provides a model for exploring the lives of his contemporaries.

Throughout this project, I have been conscious that scholarly interest in convictism and issues of public law is not yet matched by attention to the everyday criminal jurisdiction of the Supreme Court of Van Diemen's Land. A rudimentary survey of its first three years of proceedings points to the value of a systematic quantitative study of the operation of the criminal law in Van Diemen's Land/Tasmania, which could usefully complement work in other

²² Z. Laidlaw, *Colonial Connections, 1815-45: Patronage, the Information Revolution and Colonial Government* (Manchester, Manchester University Press, 2005), p. 102.

colonial common-law jurisdictions, such as the *Castle Database* in New South Wales.²³ The value of online research infrastructure for collaborative and comparative research is already being demonstrated by projects like the *Old Bailey Proceedings Online* and *Founders and Survivors*.²⁴ Hyperlinks between these web platforms will increasingly allow researchers to trace individual life-courses, so that criminal trajectories can also be charted through various jurisdictions. The explosion of archival digitisation programmes, online databases for law and history, and the developing tools and protocols of Digital Humanities all point to multiple possibilities for future research that will undoubtedly benefit from the socio-legal historical context established by the 'window on an age' approach.

Expanding on another theme touched on in this thesis, a quantitative analysis of the language of pardoning, following Peter King's factor mention system, has the potential to illuminate the executive exercise of mercy. Again, charting the criminal careers of transportees – often in Van Diemen's Land by virtue of the prerogative of mercy – could usefully identify similarities and differences between metropolitan and colonial experiences, and between recidivists and those convicted for the first time in the colonial courts.

This thesis has been less concerned to trace Pedder's 'contribution to the law',²⁵ than to grasp the law's influences on him. It has sketched out the operation of the 'bloody code' in the colony, and identified some of the legislative constraints and social pressures on the judge during the 'heyday of capital punishment'. Analysis of the civil jurisdictions of the Supreme Court of Van Diemen's Land is beyond the scope of this study, but represents a further area for research which could throw significant light on social and economic

²³ T. Castle (ed.), *Capital Punishment Database: NSW 1826-1837 (Castle Database)*, Francis Forbes Society for Australian Legal History, <<http://research.forbessociety.org.au/>> accessed 1 January 2012.

²⁴ *Old Bailey Online – The Proceedings of the Old Bailey, 1674-1913*, <www.oldbaileyonline.org> and *Founders and Survivors: Australian Life Courses in Historical Context, 1803-1920*, <<http://www.foundersandsurvivors.org/>> accessed 1 January 2012.

²⁵ J.M. Bennett, *Sir John Pedder: First Chief Justice of Tasmania* (Hobart, University of Tasmania, 1977), p. 1.

history.

Conclusion

A sensitive excavation of the archival traces of Pedder's lived experience reveals a complexity and variety which belies conventional representations of his official persona. As chief justice, he undoubtedly condemned many individuals to the gallows. Uncritically reiterating the trope of the 'hanging judge', however, diminishes our capacity to make sense of a profoundly different penal philosophy. The dictates of judicial duty and Pedder's multi-functional appointment 'at pleasure' indicate that the chief justice was less the puppet of government, than a component part of a system of governance which differs markedly from our own, but was no less legitimate. In light of contemporary discourses of Aboriginal dispossession and reconciliation, Pedder's construction as an Indigenous champion appeals to a modern audience in search of a benevolent foundation narrative. The more complex reality of Pedder's engagement with settler-indigenous interaction raises conceptually complex questions around race and law, and will require further research by scholars from a range of disciplines to untangle its many implications.

Through genealogical and biographical research, the myth of the solitary ascetic, so recently propounded by Bennett, is perhaps the least difficult to contest. It is important, however, not to underestimate its conceptual significance. This thesis is guided by the assumption that respect for the biographical subject is essential to the enterprise of life writing. It is also underpinned by the historian's central concern to engage with the archive with empathy and imagination. By appreciating the common humanity of people who lived in the past, this study argues, we can be more alert to the uses of symbolic constructions – like those applied to Pedder – which play on our emotions and prejudices, and ultimately reveal more about the sensibilities of their creators than they do about their subjects.

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CON13/1/1	Assignment Lists and Associated Papers, 1810-1859, reel Z2492
CON14	Indents of male convicts, 1824-1853
CON31	Conduct registers of male convicts arriving in the period of the assignment system, 1803-1843

Executive Council

EC4/1/1	Minutes of Proceedings of the Executive Council, 3 December 1825-6 June 1831, reel Z1474
EC4/1/2	Minutes of Proceedings of the Executive Council, 13 June 1831-10 June 1833, reel Z1474
EC4/1/3	Minutes of Proceedings of the Executive Council, 10 June 1833-29 July 1836, reel Z1475
EC4/1/4	Minutes of Proceedings of the Executive Council, 29 July 1836-15 July 1837, reel Z1476
EC4/1/5	Minutes of Proceedings of the Executive Council, 2 July 1837-23 December 1837, reel Z1476
EC4/1/6	Minutes of Proceedings of the Executive Council, 13 February 1838-4 November 1839, reel Z1477
EC4/1/7	Minutes of Proceedings of the Executive Council, 5 November 1839-30 June 1842, reel Z1478
EC4/1/8	Minutes of Proceedings of the Executive Council, 1 July 1842-31 October 1851, reel Z1478

Governor's Office

G01/1/29	Despatches received from the Secretary of State, 1838, reel Z15
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G01/1/31	Despatches received from the Secretary of State, 1838-1839, reel Z16
G02/1/3	Despatches received from the Under-Secretary of State for the Colonies, 1827, reel Z172
G025/1/1	Letterbooks of despatches sent to the Secretary of State
G026/1/1	Letterbooks of despatches sent to the Under-Secretary of State
G029/1/1	Letterbooks of despatches sent to the Commissioner for the Navy
G033/1/11	Duplicate despatches, 1832, reel Z430
G033/1/17	Duplicate despatches, 1834, reel Z435
G033/1/18	Duplicate despatches, 1834, reel Z436
G033/1/19	Duplicate despatches, 1835, reel Z437
G033/1/22	Duplicate despatches, 1836, reel Z440
G033/1/27	Duplicate despatches received by the Colonial Office
G033/1/87	Plan/Map - Map of Sullivan's Cove and part of Hobart showing projected improvements of a new Quay Road [Hobart streets, buildings and occupiers between Collins and Davey and from Harrington to Domain] Original John Lee Archer 28/1/1
G039	Miscellaneous correspondence addressed principally to the Governor
G044/1/1	Judges' reports of Supreme Court criminal cases, and associated correspondence, 1840-1841

Police Department

POL318/1/3	Letterbook of the Chief Police Magistrate with the Colonial Secretary, 1834-1835
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Probate Registry

AD960/1/203	Will of Sylvia Rebecca Sherbourne Pedder, 1988, Will No. 80556
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Registrar-General's Department

RGD34/1/2	Register of Burials in Tasmania, 1803-1933
RGD35/1/4	Register of Deaths in Hobart, 1853-1855
RGD37	Registers of Marriages (All Districts), 1839-1851
RGD38/1/1	Index to Baptisms in Tasmania, 1803-1933

Supreme Court (Registrar's Office)

SC1	General correspondence, 1825-1957
SC7/1/1	Registrar's correspondence relating to the lodging of copies of wills, the granting of letters of administration and the assessment of estates for probate and succession duties, 1837-1883
SC19/1/1	Chief Justice's inward correspondence relating to the submission to the Governor-in-Council of cases in which prisoners were capitally convicted, 1836-1860
SC32/1/1	Minutes of proceedings in criminal cases, various centres, including Norfolk Island
SC41/1/1	Register of prisoners tried in criminal cases, 1824-1832
SC41/1/2	Register of prisoners tried in criminal cases, 1824-1827
SC41/1/3	Register of prisoners tried in criminal cases, 1827-1830
SC41/1/4	Register of prisoners tried in criminal cases, 1830-1833
SC45/1/1	Register of prisoners discharged by proclamation, 1825-1827
SC46/1/1	Sheriff's register of persons executed, 1833-1853
SC74/1/1-29	Documents in cases in ecclesiastical jurisdiction (including probate), 1823-1961
SC124/1/1	Inquisitions and associated papers, 1824-1841
SC195	Findings, depositions and associated papers relating to coroners' inquests [extant from 1828]
SC197/1/1	Sheriff's register (as Coroner) of findings in inquests throughout the island, 1828-1841
SC202	Enrolments of Acts of Council, 1830-1851
SC213	Recognizances entered into by newspaper publishers for the printing and publication of newspapers, 1832-1937
SC306/1/1-3	Registrar's letterbooks, 1825-1838
SC363/1/1	Registrar's copy of rules of practice and table of fees for Supreme Court of New South Wales, [n.d.]
SC418/1/1	Copy of rules and orders of the Supreme Court, 1831
SC506/1/1	Copies of various acts relating to Supreme Court procedure with rules and orders thereunder, 1854

Shipping records

CUS36/1/297	Cargo, passenger and crew lists, manifests and associated documents relating to ships clearances: <i>Jane Frances</i> (1846)
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- MB2/39/1/1 Reports of ships arrivals with lists of passengers, 1829-1833, reel Z2185
- MB2/39/1/10 Reports of ships arrivals with lists of passengers, 1847-1848, reel Z2188

Miscellaneous

- MM71/1/7-10 Tasmanian Archival Estrays in the State Library of New South Wales: Dixon Collection. Governor's Office – Chief Justice Reports, 1823-1839, reels Z3234-3237

Miscellaneous Collection of Photographs

- PH30/1/280 John Lewes Pedder,
<<http://portal.archives.tas.gov.au/menu.aspx?detail=1&type=id&id=336>> accessed 24 November 2009.
- PH30/1/1977 John Lewes Pedder,
<<http://portal.archives.tas.gov.au/menu.aspx?detail=1&type=id&id=2643>> accessed 24 November 2009.

iv) STATE RECORDS OFFICE OF WESTERN AUSTRALIA

Colonial Secretary's Office

Series No. 2755 Letterbooks (Outwards Correspondence): Letters 1735-2253 (1831)

Series No. 2941 Correspondence – Inward correspondence, 08/04/1831-07/06/1831

UNITED KINGDOM

i) GENERAL REGISTER OFFICE, HOME OFFICE IDENTITY & PASSPORT SERVICE

Certified copy of an entry of death

John Pedder, 1 November 1844, GRO December Quarter 1844, Lewisham, vol. 5, p. 233, no. 432

John Lewes Pedder, 24 March 1859, GRO March Quarter 1859, Brighton, vol. 2b, p. 179, no. 116

Jane Pedder, 13 November 1864, GRO December Quarter 1864, St George Hanover Square, vol. 1a, p. 216, no. 106

Jane Ann Nunn, 3 June 1906, GRO June Quarter 1906, Portsmouth, vol. 2b, p. 322, no. 471

ii) HER MAJESTY'S COURTS SERVICE

Will of Sir John Lewes Pedder, of 8, Bedford Square, Brighton, Sussex, dated 3 March 1859, proved 13 April 1859

Will of Jane Pedder, of 4, Western Cottages, Brighton, Sussex, dated 7 April 1863, proved 19 December 1864

iii) THE NATIONAL ARCHIVES

Chancery: Original Letters Patent of Denization

C 97/3 George Brucker, Letters Patent of Denization, 20 March 1765

Prerogative Court of Canterbury and related Probate Jurisdictions:

Will Registers

PROB 11/1208 Will of John Pedder of Chatham Place, Middlesex, dated 26 January 1789, proved 17 August 1791

PROB 11/1341 Will of George Brucker, Esquire, of Clapham Common, Surrey, dated 8 March 1800, proved 5 May 1800

PROB 11/1493 Will of Elizabeth Pedder, Widow, of Surrey Street, Strand, Middlesex, dated 6 April 1805, proved 20 February 1809

PROB 11/1567 Will of Thomas Cooper Everitt of Saint Marylebone, Middlesex, dated 12 June 1809, proved 14 April 1815

PROB 11/1940 Will of Mary Everitt, Widow of Brighton, Sussex, dated 17 October 1834, proved 8 February 1841

PROB 11/1992 Will of William Pedder, Captain in His Majesty's Sixty Third Regiment of Foot of Hobart Town, Van Diemen's Land, dated 26 December 1833, proved 6 January 1844

PROB 11/2062 Will of Henry Yarburgh Everitt, Esquire, of Brighton, Sussex, dated 16 December 1846, proved 22 September 1847

War Office

WO 97/1123 Royal Hospital Chelsea: Soldiers service documents, 1760-1854

B. PRIVATE

AUSTRALIA

i) TASMANIAN ARCHIVE AND HERITAGE OFFICE**Non-State Records**

- NS323/1/1 Diary of Adam Amos, 1822-1825
- NS361/1/1 Register of admissions to the Hutchins School, 1846-1892, reel Z2233
- NS282/10/1/4 Register of Marriages, St David's, Hobart, reel Z2247
- NS363/1/2 Personal papers of William Sorell mainly relating to the Administration of Estates. Accounts, letters and associated papers used by Sorell in the administration of the estate of Captain William Pedder
- NS596/1/1 Plan showing 'Secheron Estate', Battery Point with partial subdivision
- NS690/1/99 W.H. Hudspeth's Historical Files. Subject file: Christ College Centenary
- NS1053/1/1 Committee of Subscribers to Archdeacon Hutchins' School, Correspondence. Letter and attachment of subscribers from J.L Pedder, Chairman of the Committee, to John Leake, 11 June 1841.

Correspondence Files

Bent, Andrew

Frankland, George

Gatehouse family

Loane, Roland Walpole

Pedder, Chief Justice

Pedder, Joseph

Simpson, James

ii) NATIONAL LIBRARY OF AUSTRALIA**Australian Joint Copying Project: Public Record Office personal collections**

- PRO 30/45/1 Joseph Hatton: Collection of Home Office criminal papers. Henry, Viscount Sidmouth Home Secretary, 11 June 1812-16 January 1822: Letters to various or unnamed persons, 1821, AJCP reel 6091. [Original held by The National Archives, UK]

Australian Joint Copying Project: Miscellaneous reels

Catton Papers Papers of Sir R.J. Wilmot Horton, Under Secretary of State for War and the Colonies, 1821-1828, AJCP reels M791-M792

Manuscript Collection

MS 902 Thomas Buxton to his Father Mother and Sisters, 14 September 1821. [Photocopy. Original held by Derbyshire County Record Office, UK]

MS 248/174 Papers of Sir John and Lady Franklin: 23 letters from Jane Franklin to Mary Simpkinson, from Van Diemen's Land, 1837-1853, reel G2486. [Microfilm. Original material held by the Scott Polar Research Institute, Cambridge, UK]

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Ham, T., *Key to the Map of Australia Felix, and Its Squatting Districts* (Melbourne, Thomas Ham, 1847), National Library of Australia, Digital Collections, Maps, <<http://nla.gov.au/nla.map-rm1295>> accessed 7 October 2009.

iii) MITCHELL LIBRARY, STATE LIBRARY OF NEW SOUTH WALES

ML ZA 1962 Letters of Colonel George Arthur, reel CYPOS980

ML ZA 2169 Papers of Sir George Arthur, Letters of Chief Justice Pedder, 1821[sic]-1831, vol. 9, reel MAV/FM4/ 3671

ML ZA 2170 Papers of Sir George Arthur, Letters of Chief Justice Pedder, 1832-1840, vol. 10, reel MAV/FM4/ 3671

iv) UNIVERSITY OF TASMANIA SPECIAL AND RARE MATERIALS COLLECTIONS

S17/2 Journal of William Sorell, 1 August 1823–12 August 1825, Transcript by L. Rodda and P.S. King

Franklin, J., *Copies of letters from Jane, Lady Franklin, Van Diemen's Land, to her sister Mary Simpkinson 1838-1843*, University of Tasmania Library Special and Rare Materials Collection, Australia (Unpublished), <<http://eprints.utas.edu.au/10548/>> accessed 23 November 2011.

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Royal Society of Tasmania Library Collection

- RS5/8 J.L. Pedder obituary, *Hobart Town Advertiser*, 1859
- RS8/F7 William and John Clark of Cluny, Bothwell, Family Papers, 1812-1872. William Pritchard Weston to sister-in-law, Jane Clark, 1833-1836, 1855-1861
- RS8/F44 William and John Clark of Cluny, Bothwell, Family Papers, 1812-1872. Maria (Everett) Pedder, wife of Sir John Pedder, 1837-1854
- RS16/4 Franklin Papers. Papers relating to the Tasmanian Society 1841-1842
- RS16/8 Franklin Papers. Mrs Mary Simpkinson. Copies of letters from her sister Lady (Jane) Franklin, 1838-1843
- RS25/2/(4) Boyes, G.T.W.B., *Diary of G.T.W.B. Boyes, Van Diemen's Land, Feb 28th, 1833-June 1st, 1835*, University of Tasmania Library Special and Rare Materials Collection, Australia. (Unpublished),
<[http://eprints.utas.edu.au/8848/1/rs_25_2_\(4\)_GWT_Boyes_Diary_28th_February_1833-_June_1st_1835.pdf](http://eprints.utas.edu.au/8848/1/rs_25_2_(4)_GWT_Boyes_Diary_28th_February_1833-_June_1st_1835.pdf)> accessed 4 September 2011.
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<[http://eprints.utas.edu.au/9217/1/rs_25_2_\(5\)_GWT_Boyes_Diary_3rd_June_1835-_11th_June_1838.pdf](http://eprints.utas.edu.au/9217/1/rs_25_2_(5)_GWT_Boyes_Diary_3rd_June_1835-_11th_June_1838.pdf)> accessed 4 September 2011.
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UNITED KINGDOM

i) CAMBRIDGE UNIVERSITY LIBRARY, MANUSCRIPTS DEPARTMENT

Pelican Insurance Company, PL23 Share ledger, 1797-1891 (index to share transactions); and PL28 Share transfer ledger, 1843-52

Phoenix Assurance Company, PX26 Share register journal, 1854-62

ii) EAST SUSSEX COUNTY RECORD OFFICE

Brighton St Nicholas, Parish Registers, Marriages, PAR 255/1/3/4, 1823-26.
FHL British Film 1067115, Genealogical Society of Utah.

Brighton Chapel Royal, Parish Registers, Baptisms, PAR 259/1/2/2, 1852-80.
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iii) SOCIETY OF GENEALOGISTS

MF 1868, Bramfield: C 1559-1811, M 1559-1839, Banns 1755-> 1818,
B 1559-1768 [microfilm]

2. PRINTED PRIMARY SOURCES**A. Acts of Parliament****Imperial**

13 Edw. I, cc. 1 and 4, *Statute of Winchester* (1285)

21 Jac. I, c. 27, *An Act to prevent the destroying and murthering of Bastard Children* (1642)

12 and 13 Will. III, c. 2, *An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject* [Act of Settlement] (1701)

9 Geo. I, c. 22, *Waltham Black Act* (1723)

14 Geo. II, c. 6, *An Act to render the Laws more effective for Preventing the Stealing and Destroying of Sheep* (1741)

25 Geo. III, c. 37, *An Act for Better Preventing the Horrid Crime of Murder* [Murder Act] (1752)

22 Geo. III, c.75, *Colonial Leave of Absence or Burke's Act* (1782)

43 Geo. III, c. 53, *Lord Ellenborough's Act* (1803)

60 Geo. III & 1 Geo. IV c. 1, *An Act to prevent the training of Persons to the Use of Arms, and to the Practice of Military Evolutions and Exercise* [Training Prevention or Unlawful Drilling Act] (1819)

60 Geo. III & 1 Geo. IV c. 2, *Seizure of Arms Act* (1819)

- 60 Geo. III & 1 Geo. IV c. 4, *Misdemeanors Act* (1819)
- 60 Geo. III & 1 Geo. IV c. 6, *Seditious Meetings Prevention Act* (1819)
- 60 Geo. III & 1 Geo. IV c. 8, *An Act for the more effectual Prevention and Punishment of Blasphemous and Seditious Libels [Criminal Libel Act]* (1819)
- 60 Geo. III & 1 Geo. IV c. 9, *Newspaper and Stamp Duties Act* (1819)
- 3 Geo. IV, c. 38, *An Act for the further and more adequate Punishment of Persons convicted of Manslaughter, and of Servants convicted of robbing their Masters, and of Accessories before the Fact to Grand Larceny, and certain other Felonies* (1822)
- 4 Geo. IV, c. 34, *Master and Servants Act* (1823)
- 4 Geo. IV, c. 48, *An Act for enabling Courts to abstain from pronouncing Sentence of Death in certain Capital Felonies [Judgment of Death Act]* (1823)
- 4 Geo. IV, c. 96, *An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto [New South Wales Act]* (1823)
- 7 & 8 Geo. IV, c. 27, *Criminal Statutes (Repeal) Act* (1827)
- 7 & 8 Geo. IV, c. 28, *An Act for Improving the Administration of Justice in Criminal Cases in England [Previous Convictions (Proof) Act]* (1827)
- 7 & 8 Geo. IV, c. 29, *Larceny Consolidation Act* (1827)
- 7 & 8 Geo. IV, c. 30, *Malicious Injuries to Property Act* (1827)
- 9 Geo. IV, c. 31, *An Act for consolidating and amending the Statutes in England relative to Offences against the Person [Offences against the Person or Lord Lansdowne's Act]* (1828)
- 9 Geo. IV, c. 83, *An Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other Purposes relating thereto [Huskisson or Australian Courts Act]* (1828)
- 11 Geo. IV & 1 Will. IV, c. 66, *Forgery Act* (1830)
- 6 & 7 Will. IV, c. 114, *An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney [Prisoners' Defence Counsel Act]* (1836)

Colonial

- 8 Geo. IV No. 2, *An Act to regulate the printing and publishing of newspapers* (1827)
- 8 Geo. IV No. 3, *An Act imposing a stamp duty upon newspapers* (1827)
- 9 Geo. IV, No. 5, *An Act to regulate the Constitution of Juries* (1830)
- 5 Will IV, No. 11, *An Act for the extension of Trial by Jury and to regulate the*

Constitution of Juries (1834)

2 Vic. No. 8, *An Act for Registering Births, Deaths and Marriages in the Island of Van Diemen's Land and Its Dependencies* (1838)

10 Vic. No. 5, *Dog Act* (1846)

17 Vic. No. 24, *Retiring Pensions for Judges of the Supreme Court Act* (1854)

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Australia

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Maitland Mercury, 1855

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Mercury, 1872-1873

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Tasmanian and Austral-Asiatic Review, 1828-1830

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United Kingdom

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Jackson's Oxford Journal, 1845-1847

London Chronicle, 1793

London Evening Post, 1776

London Gazette, 1772-1838?: <<http://www.london-gazette.co.uk/>>

Morning Chronicle, 1800

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Abbott, C., *A Treatise of the Law Relative to Merchant Ships and Seaman* (various editions; originally published London, 1802)

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